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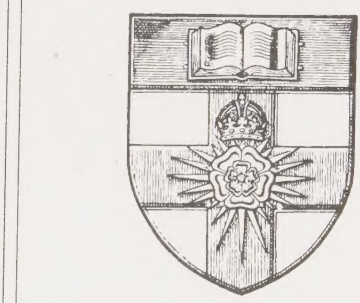

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THE

CRIMINAL APPEAL REPORTS

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED.

JUNE 15, 1936, TO AUGUST 15, 1938.

EDITED BY

T. R. FITZWALTER BUTLER,

OF THE INNER TEMPLE AND MIDLAND CIRCUIT, BARRISTER-AT-LAW.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS, AND MR. JUSTICE HILBERY.

FRANK SHERIDAN.

1936.
15 & 29 *June.*

Plea—Autrefois Convict—Indictable Offence Dealt with Summarily—Announcement by Magistrates of Decision to Convict—No Sentence Pronounced—Character and Antecedents of Prisoner proved—Subsequent Decision of Magistrates to Commit for Trial—Right of Magistrates to Commit for Trial after commencing to deal with Case Summarily—Criminal Justice Act, 1925 (15 & 16 *Geo.* 5, *c.* 86), *s.* 24 (1) *and* (2).

Magistrates do not deprive themselves of the right to commit for trial a prisoner charged with an indictable offence merely by embarking on a summary trial of the charge. They do so only if they proceed to adjudicate on the case by convicting or acquitting.

HERTFORDSHIRE JUSTICES [1911] 1 K. B. 612, followed and applied.

Where, however, magistrates had dealt with an indictable offence summarily and at the close of the evidence had announced their intention to convict, but had not passed any sentence, and subsequently altered their minds and decided to commit the prisoner for trial at quarter sessions :—

Held, that on an indictment for the same charge at quarter sessions the prisoner could successfully plead *autrefois convict*, as it was not necessary, in order to sustain that plea, that conviction should be followed by sentence.

MILES (1890) 24 Q. B. D. 423, and BLABY [1894] 2 Q. B. 170, applied.

In view of the specific language of section 24 (1) of the Criminal Justice Act, 1925, it is proper for magistrates, before deciding whether to deal summarily with an indictable offence, to acquaint themselves with the record and antecedents of the prisoner.

Dicta of AVORY, J., in HERTFORDSHIRE JUSTICES [1911] 1 K. B. 612, at p. 624, distinguished.

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Hewart, L.C.J., Humphreys, J., Hilbery, J.

Appeal against conviction.

The appellant was convicted at Southend Borough Quarter Sessions on April 24, 1936, of obtaining goods by false pretences and also of obtaining credit by fraud, contrary to section 13 of the Debtors Act, 1869, and was sentenced by the Recorder to nine months' imprisonment with hard labour.

At the petty sessional court the appellant was charged originally only with the offence of obtaining credit by fraud. In accordance with the provisions of section 24 (2) of the Criminal Justice Act, 1925 (*a*), he was informed of his right to trial by jury, but consented to be dealt with summarily and pleaded not guilty. At the close of the case the magistrates announced that they found the appellant guilty. In order to assist the magistrates on the question of sentence,

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(*a*) Criminal Justice Act, 1925, s. 24 (1): "Where a person who is an adult is charged before a court of summary jurisdiction with an indictable offence, being one of the offences specified in the Second Schedule to this Act, the court, if it thinks it expedient so to do, having regard to any representation made in presence of the accused by or on behalf of the prosecutor, the character and antecedents of the accused, the nature of the offence, the absence of circumstances which would render the offence one of a grave or serious character and all the other circumstances of the case (including the adequacy of the punishment which a court of summary jurisdiction has power to inflict), and if the accused, when informed by the court of his right to be tried by a jury, consents to be dealt with summarily, may, subject to the provisions of this section, deal summarily with the offence, . . ."

By sub-section 2 if a Court of summary jurisdiction at any time during the hearing of a charge for such an indictable offence as aforesaid decides to deal with the case summarily, the Court shall "cause the charge to be reduced into writing and read to the accused and shall then address to him a question to the following effect, 'Do you desire to be tried by a jury, or do you consent to the case being dealt with summarily?'" with any necessary explanations, "and if the accused consents to be dealt with summarily, shall forthwith ask him the following question, 'Do you plead guilty or not guilty?'"

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certain previous convictions of the appellant were then proved by a police officer. The magistrates then announced that they would not deal with the case, but would commit the appellant for trial at quarter sessions, and remanded him for a week. On the remand, the charge of obtaining goods by false pretences from a different person was added, and the appellant was committed for trial on both charges.

At quarter sessions the appellant pleaded *autrefois convict* in respect of the charge of obtaining credit by fraud, but the Recorder overruled the plea.

J. E. M. Gunning, for the appellant:

The justices had no right to commit the appellant for trial after they had agreed to try him summarily and had found him guilty. The decision in HERTFORDSHIRE JUSTICES (*supra*) is to be distinguished because in that case the justices did not actually convict. Here the justices adjudicated on the matter and actually convicted. With regard to the other count, the Recorder never put the law as to false pretences to the jury at all. He never mentioned that it was necessary for intent to defraud to be proved.

Eustace Fulton, for the Crown:

A mere conviction will not support a plea of *autrefois convict*, unless there is also a sentence. It is the duty of justices under the Criminal Justice Act, 1925, to have regard to the prisoner's character and antecedents, but they cannot do this before conviction. They must therefore be satisfied that the prisoner is guilty before they assume jurisdiction, and it does not matter whether they say so in open Court or not. The question is not whether the prisoner has been convicted but whether the justices have adjudicated.

At the close of the argument the LORD CHIEF JUSTICE said that the appeal would be allowed, the conviction quashed, and the appellant discharged, but, as there was a question of some importance with regard to the second

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count, the Court would give judgment in writing on a later day.

Cur. adv. vult.

June 29.—The following written judgment of the Court was read by:

HUMPHREYS, J.: The appellant in this case was convicted at the Quarter Sessions for the Borough of Southend-on-Sea upon both counts of an indictment which charged him in the first count with obtaining goods from Dorothea Margaret Tredgett by false pretences, with intent to defraud, and in the second count with obtaining credit to the amount of 24s. from Lilian Emily Reid Patten under false pretences or by means of fraud other than false pretences, contrary to section 13 of the Debtors Act, 1869. He appealed by leave of the Court against both convictions.

At the hearing of the appeal the Court allowed the appeal, quashed the convictions, and ordered the discharge of the appellant. We now proceed to state our reasons for that decision.

With regard to the first count, it is sufficient to say that the summing-up of the learned Recorder was inadequate and unsatisfactory in many respects, and in particular that there was no direction to the jury that intent to defraud was an essential part of the case to be proved by the prosecution. The false pretences laid were "that he (the appellant) was the authorised representative of Messrs. Wills, a firm of tobacconists, and that he was authorised by the said firm to accept certain cigarettes and pipes and give credit for them". The only direction in law which the jury received from the Recorder upon this count is to be found in two statements in different parts of the summing-up: "You have to be satisfied that these representations were made and that she believed them", and "If you are satisfied that those representations were made which would lead to fraud, then you must find the defen-

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dant is guilty." In the absence of any proper direction as to the necessity for the prosecution to prove an intent to defraud on the part of the accused, it is impossible to allow the conviction on that count to stand.

The objection raised to the conviction on the second count was of a different character. At the trial Mr. Gunning for the appellant raised a plea of *autrefois convict*, which was overruled by the Recorder.

It appears that the appellant was originally charged at the Petty Sessional Court at Southend with one offence only, *viz.*: that of obtaining credit from Mrs. Patten, contrary to section 13 of the Debtors Act, 1869. That offence being one of those specified in the Second Schedule to the Criminal Justice Act, 1925, the appellant was addressed by the Court in the terms of section 24 (2) of that Act, and thereupon consented to be dealt with summarily. He pleaded not guilty. Evidence was called for the police, who were the prosecutors, and the appellant gave evidence on his own behalf. At the close of the case the justices conferred and then announced that they found the appellant guilty.

In order to assist the Court upon the question of sentence, the only matter remaining to be dealt with, a police officer then proved certain previous convictions against the appellant, whereupon the magistrates announced that they would not deal with the case, but would commit the appellant for trial at quarter sessions, and remanded him for a week. On the remand, the charge of obtaining goods by false pretences from Mrs. Tredgett was added, and the appellant was committed for trial upon both charges.

Upon those facts this would seem to be a plain case of *autrefois convict*. The accused was convicted at Southend Petty Sessions by a Court of competent jurisdiction of precisely the same offence and upon precisely the same facts as were relied upon in support of the second count of the indictment. Mr. Fulton has argued that there can be no conviction such as will support a plea of *autrefois convict*,

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unless there is also a sentence. In our judgment, that is not the law.

In the case of BLABY, [1894] 2 Q. B. 170, the question to be decided was the meaning to be given to the word "conviction" in a statute which provided that certain consequences should ensue upon a conviction for a misdemeanour following upon a previous conviction for a similar offence. It appeared from a certificate produced that the prisoner had been convicted on a previous occasion, but that no judgment had been pronounced. It was argued for the prisoner that conviction must include judgment or sentence, but a very strong Court for consideration of Crown Cases Reserved held that the word "conviction" in such a connection merely referred to a plea of guilty by the accused, or the finding of a verdict of guilty by a jury, and Hawkins, J., in delivering the judgment of the Court, observed at p. 172: "The intention of the Legislature in this section was that the finding of the jury that the accused was guilty should be treated as a conviction; 'convicted' meant 'found guilty', and the sentence was to follow on the conviction." That decision is, in our judgment, in point in this case, as are the judgments to the same effect in MILES, [1890] 24 Q. B. D. 423, and in particular the judgment of Charles, J., in that case.

Our attention has been directed to HERTFORDSHIRE JUSTICES, [1911] 1 K. B. 612. In that case, a defendant charged with an indictable offence having consented to the case being dealt with summarily, it appeared to the justices at the close of the evidence that the case had assumed such a serious aspect by reason of a conflict of evidence as to an alibi that it would not be right for them to deal with it, and they accordingly committed the defendant for trial. It was held *inter alia* by a Divisional Court that the justices by embarking upon a summary trial of the charge were not thereby deprived of their right to commit the defendant for trial. We entertain no doubt at all that that case was

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rightly decided, but it is to be observed that there was in that case no adjudication upon the charge by the justices, and in the course of his judgment Pickford, J., put the present case when he observed as follows, at p. 622: "Undoubtedly if the justices had proceeded to adjudicate on the case either by convicting or by acquitting the defendant, that would have afforded ground for a good plea to the indictment." In our opinion the present is a case where the justices have proceeded to adjudicate by convicting the defendant, and accordingly the plea of *autrefois convict* was established.

Some comment was made in the course of the argument upon the *dicta* of Avory, J., at p. 624 in the HERTFORDSHIRE JUSTICES case (*supra*) as to the right of justices to inquire into the character and antecedents of the person charged before deciding to convict. The language of section 12 of the Summary Jurisdiction Act, 1879, the statute then in force, is somewhat different from that used in section 24 of the Criminal Justice Act, 1925. A consideration of subsection (1) of the latter section makes it plain, in our view, that justices are now required, as a preliminary to any decision as to dealing summarily with an indictable offence, to hear and to take into consideration certain matters specified in the section, one of them being the character and antecedents of the accused, to enable them to decide whether they ought to deal with the case summarily. Such a course does not appear to involve any unfairness to the accused. Presumably, if the character of the accused as stated to them appears to them to be bad, the justices will refuse to deal with the case summarily, will proceed to take depositions and, if a *prima facie* case is proved, to commit the accused for trial; on the other hand, if the character given to the accused is a good one, no harm will be done by the justices having heard that fact stated early in the proceedings.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS, AND MR. JUSTICE GODDARD.

1936.
13 *July.*

JAMES GRANT.

Plea—Autrefois Convict—Indictable Offence Dealt with Summarily—Plea of Guilty—No Sentence Pronounced—Subsequent Decision to Commit for Trial—Jurisdiction of Magistrate—Criminal Justice Act, 1925 (15 & 16 *Geo.* 5, *c.* 86), *s.* 24 (1) *and* (2).

A magistrate decided to deal summarily with an indictable offence, and the prisoner pleaded guilty. The magistrate did not, however, pass sentence forthwith, but remanded the prisoner on bail until he had obtained a report. On obtaining the report, the magistrate altered his mind and decided to commit the prisoner for trial at quarter sessions.

Held, as the prisoner had already been "convicted" on his own confession, the magistrate had no jurisdiction to commit him for trial, and the prisoner could successfully plead *autrefois convict* at quarter sessions.

SHERIDAN, (1936) 26 Cr. App. R. 1, followed and applied.

Appeal against conviction.

The appellant was convicted at the County of London Sessions on May 28, 1936, of larceny and was sentenced by the Deputy-Chairman to twenty-one months' imprisonment with hard labour.

When the appellant appeared before the police magistrate, he was asked, in accordance with the terms of section 24 (2) of the Criminal Justice Act, 1925 (*a*), if

(*a*) Criminal Justice Act, 1925, s. 24 (1): "Where a person who is an adult is charged before a court of summary jurisdiction with an indictable offence, being one of the offences specified in the Second Schedule to this Act, the court, if it thinks it expedient so to do, having regard to any representation made in presence of the accused by or on behalf of the prosecutor,

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he consented to being dealt with summarily. He consented and pleaded guilty. The magistrate did not pass sentence forthwith, but remanded the appellant on bail, and obtained a report from the Institute of Scientific Delinquency. He then altered his mind and decided to commit the appellant for trial at quarter sessions. He set out his reasons in a letter addressed to the Clerk of the Peace for the County of London in the following terms: "I am committing for trial to-day James Grant. He pleaded guilty and consented to my jurisdiction. In view of his record and age I obtained a report during remand on bail from the Institute of Scientific Delinquency. I enclose a copy of that report. I feel that it is a case Quarter Sessions should deal with."

At the trial the appellant, who was unrepresented, did not put forward any defence, nor did he cross-examine any of the witnesses for the prosecution, but, when called on by the Deputy-Chairman to address the jury if he wished to do so, stated that he did not think that he had had a fair trial because the magistrate had told him that he would

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the character and antecedents of the accused, the nature of the offence, the absence of circumstances which would render the offence one of a grave or serious character and all the other circumstances of the case (including the adequacy of the punishment which a court of summary jurisdiction has power to inflict), and if the accused, when informed by the court of his right to be tried by a jury, consents to be dealt with summarily, may, subject to the provisions of this section, deal summarily with the offence, . . ."

By sub-section 2, if a Court of summary jurisdiction at any time during the hearing of a charge for such an indictable offence as aforesaid decides to deal with the case summarily, the Court shall "cause the charge to be reduced into writing and read to the accused and shall then address to him a question to the following effect, 'Do you desire to be tried by a jury, or do you consent to the case being dealt with summarily?'" with any necessary explanations, "and if the accused consents to be dealt with summarily, shall forthwith ask him the following question, 'Do you plead guilty or not guilty?'"

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give him six months' imprisonment with hard labour and had afterwards changed his mind and committed him for trial.

J. E. M. Gunning, for the appellant:

The case is covered by SHERIDAN, (1936) 26 Cr. App. R. 1. [He was stopped.]

G. G. Raphael, for the Crown:

In SHERIDAN (*supra*) the justices had adjudicated on the case. Here the conviction was recorded only because the appellant had pleaded guilty. Justices are likely to be put in a difficulty if they have to inquire into all the matters mentioned in section 24 (1) of the Criminal Justice Act, 1925, before they decide whether they will deal with a case summarily.

HUMPHREYS, J. (after stating the facts as set out above): It appears from the history of this case that there existed in the minds both of the Deputy-Chairman and the committing magistrate some confusion as to the duties of justices who are invited, or of their own motion propose, to deal summarily with an indictable offence. The Deputy-Chairman, having before him the fact that the appellant had already pleaded guilty (the appellant said, no doubt wrongly, that he had also been sentenced), ought to have taken one of two courses. He might have discharged the jury from giving a verdict and directed the Clerk of the Court to file on behalf of the appellant a plea of *autrefois convict*. The jury would then have been sworn to try that issue, and in the circumstances of the case the Deputy-Chairman would have directed the jury that the appellant had proved his plea. Thereupon the proceedings would have ended, and the appellant would have been discharged. Alternatively, if the prosecution did not insist on the plea being formally put on the file, the Deputy-Chairman might have told the jury that it was clear that the appellant had

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already been convicted of the charge and that, as it was not the law that a person should be twice convicted of the same offence by two different tribunals, they must find him not guilty. Unfortunately the Deputy-Chairman was not alive to the position and merely said: "As I gather from the defendant, he has got some grievance against the magistrate because, having originally sentenced him to six months' imprisonment, he subsequently changed his mind and sent him to these sessions, which have the power of inflicting a heavier punishment than six months. I am afraid that is not a matter which you can deal with."

It is the duty of magistrates when they have before them a person accused of an offence which, although indictable, can in certain circumstances be dealt with summarily, to obey the directions contained in section 24 (1) of the Criminal Justice Act, 1925. [His Lordship read the sub-section, and continued:] In SHERIDAN (*supra*) this Court held that it was the duty of magistrates to inquire into those matters before they make up their minds whether they will deal summarily with the case. It has been suggested by Mr. Raphael that that course may put a Court of summary jurisdiction in a difficulty. There is really no great difficulty if Courts of summary jurisdiction will remember that the offence is one which is primarily indictable and that their first duty is to take depositions. If, in the course of taking depositions or before depositions are taken at all, the Court is satisfied, having regard to the matters which by section 24 (1) of the Act of 1925 it is directed to consider, that the case is one which from that point of view it would be right to deal with summarily, then the Court may, with the consent of the accused person, decide to deal with the case summarily. In SHERILAN (*supra*) this Court decided that, while a Court of summary jurisdiction has power to deal summarily with an indictable offence at any stage of the case and to commit for trial an accused person whom it has commenced to deal with

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summarily up to the time when the Court has either convicted or acquitted, it has no power, once it has arrived at a decision on the case, to alter that decision and commit for trial, because by that time the accused person has been either convicted or acquitted, and, if the Court has registered a conviction, the only matter remaining for the Court is that of sentence.

The only difference between SHERIDAN (*supra*) and the present case is that in that case the prisoner pleaded not guilty and the trial proceeded and at the close of the case the magistrates convicted, whereas in the present case the appellant pleaded guilty. There is no distinction in law between a conviction by the verdict of a jury or the finding of a Court, and a conviction on a prisoner's own confession. The decision in SHERIDAN (*supra*) would be binding on the present Court, even if the Court entertained any doubt as to its correctness, which it does not.

The Court has to deal with the question whether on the trial before the jury at quarter sessions the appellant was right in relying, as in effect he tried to rely, on a plea of *autrefois convict*. In the view of the Court he was entirely right. The appeal must be allowed and the conviction quashed.

Conviction quashed.

Solicitor for the Crown : Solicitor for Metropolitan Police.

PRACTICE NOTE ON TAXATION OF COSTS IN CRIMINAL CASES.

1936. 30 *July.*

The Costs in Criminal Cases Act, 1908, by section 1, empowers the Court of trial to direct payment of the costs of prosecution or defence out of local funds. By section 6 (1): "The Court by or before which any person is convicted of any indictable offence may, if they think fit, in addition to any other lawful punishment, order the person convicted to pay the whole or any part of the costs incurred in or about the prosecution and conviction including any proceedings before the examining justices, as taxed by the proper officer of the Court." By sub-section (5): "Any order under this section may be enforced . . . in the same manner as an order for the payment of costs made by the High Court in civil proceedings . . ."

In a case recently tried by Singleton, J., at Assizes three defendants, who had pleaded guilty, were fined and ordered to pay the costs of the prosecution, and the indictment was endorsed: "Each defendant was fined £200 and all three defendants were ordered jointly and severally to pay the costs of the prosecution herein."

After the Assizes had terminated, the Director of Public Prosecutions took out a summons to review the certificate of the Clerk of Assize, which, after setting out the formal parts, was in the following terms: "It is thereupon ordered and adjudged by this Court that [the defendants] do each pay a fine of £200 and it is further ordered that [the defendants] do jointly and severally pay a sum not exceeding £230 towards the costs of the prosecution herein. And whereas the costs of the prosecution herein have been taxed and allowed at the sum of £230, it is hereupon ordered and adjudged by this Court that [the defendants] do jointly and severally pay to the Director of Public Prosecutions the said sum of £230." The Director's contention was that the Clerk of Assize had wrongly interpreted the order of Court in that no such limit had been ordered by the Judge and in that there had been no taxation of costs under sec-

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tion 6. It was further contended that, as the order of the Judge was that the defendants should pay the costs of the prosecution, such order was not carried out by an allowance or an assessment under section 1. It was objected by counsel for the defendants that no review was possible, having regard to the fact that the Assizes had ended, and that the certificate of the Clerk of Assize was final. The matter came before the Judge in Chambers, and was referred by him to Singleton, J.

Singleton, J., *held*, that under section 70 (4) of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides: "A commissioner [of Assize] appointed in pursuance of this section shall when engaged in the exercise of any jurisdiction assigned to him in pursuance of this Act be deemed to constitute a Court of the High Court," read together with section 18, which deals with the general jurisdiction of the High Court, a Judge of Assize has power, even after the termination of the Assize, to review and vary the certificate of the Clerk of Assize when such certificate does not correctly carry out the sentence which is endorsed on the indictment, and in a case such as the present to direct taxation of the bill of costs.

He further added that, when either side is ordered to pay costs under section 6 of the Act of 1908, the bill of costs ought, if possible, to be put before the Clerk of Assize before the end of the Assize and notice ought to be given to the other party to the taxation, so that any question arising on the order can be decided forthwith.

As the indictment was not then before him and the Clerk of Assize had not been communicated with, he pronounced no final judgment, but adjourned the matter for a time.

The matter did not come before the Judge again, as it was subsequently settled by the defence agreeing to pay an additional sum of £300 towards the costs of the prosecution.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SWIFT, AND MR. JUSTICE DU PARCQ.

JOHN DAVIS.

1936.
26 *October.*

Discharge of Juror—Incapacity to Continue to Act—Continuance of Trial with Eleven Jurors—Necessity for Assent in Writing —Criminal Justice Act, 1925 (15 & 16 Geo. 5, c. 86), s. 15.

By the Criminal Justice Act, 1925, section 15 : " Where in the course of a criminal trial any member of the jury dies or is discharged by the Court as being through illness incapable of continuing to act or for any other reason, the jury shall nevertheless, subject to assent being given in writing by or on behalf of both the prosecutor and the accused and so long as the number of its members is not reduced below ten, be considered as remaining for all the purposes of that trial properly constituted, and the trial shall proceed and a verdict may be given accordingly."

It is important that the requirement of the above section with regard to the necessary assent being given in writing should be strictly observed.

Where, however, counsel for the Crown and counsel for the prisoner, after consultation with the prisoner, had both verbally agreed to the trial proceeding with eleven jurors,

Held, in the circumstances of the particular case, there had been no miscarriage of justice and the conviction was not invalidated by absence of consent in writing.

Application for leave to appeal against conviction and sentence.

The applicant was convicted at the Central Criminal Court on September 15, 1936, and was sentenced by the Recorder to twenty-two months' imprisonment with hard labour.

No counsel appeared on either side.

It is unnecessary to set out the facts of the case, which is reported solely on a point of practice.

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26 *October.*

JOHN DAVIS.

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DU PARCQ, J. [after stating that in the opinion of the Court there was no ground for interfering either with conviction or sentence]: There is one further matter. After the prisoner had been given in charge to the jury, it appeared that a member of the jury could read only to a very slight extent, and, as it seemed necessary that documents should be considered by the jury, the Recorder, with the concurrence of counsel for the Crown and of counsel for the prisoner, after the latter had conferred with the prisoner, discharged that juror. It does not appear, however, that the consent either of the prosecution or the accused was given in writing. [His Lordship read section 15 of the Criminal Justice Act, 1925, and continued:] It is desirable, and indeed essential, that the provisions of that section should be strictly observed.

In the present case it is plain that there is no suspicion of any miscarriage of justice and that the failure to observe the strict terms of the section had not any result which could be harmful to the accused person. The section ought, however, to be strictly observed.

Application refused.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE TALBOT AND MR. JUSTICE SINGLETON.

HENRY FIRTH PHILLIPS.

1936.
30 *November.*

Evidence — Allegations by Children against Father — Cross-Examination of Children as to Previous Statements inconsistent with Evidence—Defence that Children had been schooled in their Evidence by Mother—Cross-Examination directed not to Credit but to Foundation of Defence—Evidence of Persons to whom Previous Statements by Children were made—Admissibility.

The prisoner was charged with incest with his daughter B., the case for the prosecution resting mainly on the evidence of B. and her younger sister I. The defence was that the charge was a fabrication, and that the two children had been schooled by their mother, with whom the prisoner was on bad terms, into giving false evidence against him. Some months previously the prisoner had been convicted before a Court of summary jurisdiction of indecently assaulting B., and bound over. I. had given evidence against the prisoner on that occasion also. Each of the children denied a suggestion put to them in cross-examination by the prisoner's counsel that on separate occasions they had each admitted to another person that their evidence at the previous trial was false and that they were repeating what their mother had told them to say. Counsel sought to call as witnesses for the prisoner the two persons to whom the above statements by the children were said to have been made, but the Judge, taking the view that the cross-examination of the children on this matter had been directed to credit only, declined to admit their evidence :— *Held*, the above questions must be regarded as having been directed not to the credibility of the witnesses, but to the very foundation of the prisoner's answer to the charge, and the evidence of the persons to whom the witnesses were alleged to have made previous statements inconsistent with their evidence at the trial ought to have been admitted. The conviction must, in the circumstances, be quashed.

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30 *November*.

HENRY FIRTH PHILLIPS.

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Appeal against conviction.

The appellant was convicted at Chester Assizes on October 27, 1936, of incest with his daughter Barbara, aged twelve, and was sentenced by Lewis, J., to three years' penal servitude.

The case for the prosecution rested mainly on the evidence of the prisoner's daughter Barbara and her younger sister Ida. The defence was that the charge was a fabrication, and that the children had been schooled by their mother, with whom the appellant had for a long time been on bad terms, into giving false evidence against him. In November 1935, the appellant had been convicted before a Court of summary jurisdiction of indecently assaulting Barbara, and bound over. Ida had given evidence against the appellant on that occasion also. Each of the children were asked in cross-examination by defending counsel whether they had on separate occasions each admitted to another person that their evidence at the previous trial had not been true, and had been merely a repetition of what their mother had told them to say. Each of the children denied the suggestion. Counsel desired to call as witnesses for the defence the two persons to whom the above alleged admissions by the children were said to have been made, but Lewis, J., taking the view that the above cross-examination of the children had been directed solely to credit, refused to admit the evidence.

The further facts of the case are set out in the judgment.

John Marnan, for the appellant:

The defence was a plot of long standing directed against the appellant. It was suggested in cross-examination that the children had admitted on two occasions that, at their mother's instigation, they had given false evidence against the appellant in the previous November. That cross-examination was not directed merely to credit, but to establishing the existence of that very plot which was

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the whole of the defence. The Judge was wrong in excluding evidence of the children's admissions, first, because it was relevant to an issue before the jury. The test of relevancy is examined in ATTORNEY-GENERAL *v.* HITCHCOCK (1847), 1 Exch. 91. Secondly, the evidence excluded tended to show such bias in the witnesses as to affect, not merely their credibility, but their competency in this particular case (ATTORNEY-GENERAL *v.* HITCHCOCK, *supra*).

[TALBOT, J.: Your two points are really the same. It was your case that the children did not give their own evidence, but were merely the mouthpiece of the mother.]

Edward Clarke, for the Crown:

It is conceded that in the circumstances the evidence which the appellant desired to call ought to have been admitted, but it is suggested that this is a case where the Court might be disposed to take the view that no substantial miscarriage of justice has occurred and to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

THE LORD CHIEF JUSTICE: This appellant was convicted at Chester Assizes of incest and was sentenced to three years' penal servitude. He now appeals against conviction.

Various points of substance have been raised by counsel for the appellant, but the real point is one only, namely that the Judge at the trial excluded evidence which was sought to be offered on the part of the defence.

The appellant was married in 1923, and had three children, Barbara, born in 1924, with whom he was alleged to have committed incest, Ida, born the following year, and a small boy. Up to November 1935, he lived at Stockport with his wife and children, and on November 13, he was bound over at Stockport Police Court on the charge of indecent assault on his child Barbara. Thereupon his wife left him and took the children with her to Manchester, but about a month later she sent the children to him and went

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into domestic service. In March 1936, she obtained work in London, and on August 26 she went to Stockport and took the children back with her to London. After a conversation with her elder child Barbara she had her examined by a doctor on August 31. It is common ground that the child had been tampered with by some man, though not recently, and that her condition was consistent with intercourse in April and repeated intercourse between February and April. The story of the child Barbara was that she used to sleep in one bed with her sister, and that her father and brother slept in another room and that he used to turn her sister out of bed and get into bed with her nearly every night, and that on April 22 she suffered more pain than usual. Afterwards, she said, a woman came to live in the house from time to time and her father then attempted to commit incest with her when the woman was not staying in the house. To some extent her story was supported by that of her sister Ida.

The defence was that the small children had been schooled by the appellant's wife as to what they should say, and that the whole story proceeded from the mother, whose instruments the children had become. Accordingly counsel for the appellant, having put to each of the children in turn the suggestion that a different account of the matters leading up to the charge of indecent assault had been given by each of them to someone else and that each of them had said that the mother had in effect told them what to say, sought to call the two women to whom those statements were said to have been made, so as to show that the girls had admitted on two separate occasions that they had been schooled by their mother and that the story told by the mouths of the children was really their mother's story. In those circumstances, the matter having been faintly adumbrated and the point not having been fully argued, the Judge excluded the evidence of the two women as being irrelevant. He evidently took the view that the questions

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had been put to the children for the purpose of testing their credit, but that view was not accurate. The purpose and effect of those questions was to raise the defence on which the appellant sought to rely. The substantive part of his defence was that the children, upon whose evidence alone the case for the prosecution rested, were not speaking for themselves, but for the designer and controller of the whole matter, their mother.

Whatever the merits of that defence might have been proved to be, it was, at any rate, a defence which the appellant was entitled to raise. The questions were directed not to the credibility of the two witnesses, but to the very foundation of the appellant's answer to the charge. It was not denied by counsel for the Crown, and it appears to us, that the evidence was wrongly excluded, because a misapprehension arose from the brevity of the manner in which the matter was dealt with. If the evidence had been admitted, it is impossible to say what effect it would have produced. The witnesses might not have produced a favourable effect upon the jury, and even if they had done so, the jury might not have disbelieved the story of the two girls. On the other hand, the jury might have taken the view that the charge was a pure invention. That being so, it seems to this Court, especially in a case which exhibits an unpleasant atmosphere of a suspicious kind, impossible to say that, if the evidence excluded had been allowed to be heard, the jury must certainly or would inevitably have arrived at the same verdict.

The appeal must, therefore, be allowed and the conviction quashed.

Conviction quashed.

Solicitors—Robinson & Bradley, agents for Grundey, Chadwick & Lowe, Stockport, for appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SWIFT AND MR. JUSTICE GODDARD.

1937.
2 *February.*

JAMES CARL HARRIS.

Sentence—Increase—Uttering Letter Demanding Money with Menaces.

Increase of sentence to penal servitude in a grave case of uttering a letter demanding money with menaces.

Appeal against sentence.

The appellant pleaded guilty at the Central Criminal Court on December 1, 1936, to housebreaking with intent to steal and also to uttering a letter demanding money with menaces and was sentenced by the Recorder to eighteen months' imprisonment with hard labour.

The appellant in person.

No counsel appeared for the Crown.

The material facts of the case are set out fully in the judgment.

THE LORD CHIEF JUSTICE: This appellant pleaded guilty at the Central Criminal Court to a charge of housebreaking with intent to steal and also to a charge of uttering, knowing its contents, a letter demanding £150 from two elderly ladies with menaces and without reasonable or probable cause. He was represented in the Court below under the Poor Prisoners' Defence Act, 1930.

The case was one of an unusually grave character. During the night of November 10, 1936, the appellant climbed up a stack-pipe and made his way into a house occupied by two Misses Fish, who were elderly ladies of considerable means. One of them found him in the house wearing a mask. He demanded jewellery, and threatened

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JAMES CARL HARRIS.

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to shoot her with a pistol as she called for help. She had the nerve to take him by the arm and finally he apologised and went out of the room. There was evidence that he had climbed up a pipe at the back of the house and entered the house by means of a lavatory window.

On November 11, at 4 p.m. one of the sisters received a letter, now admittedly written by the appellant, in these terms: "Misses Fish. You had no money last night. I shall want £150, and if you go to the police your sister will die. Go to the bank to-morrow morning at 10 a.m. Get the money. I will give you further instructions when you have the money. And for your own and your sister's sake no police. You'll be watched closely all the time. 10 o'clock on Thursday. Don't fail or you'll be sorry." That letter was signed: "Visitor". Notwithstanding the threat the ladies communicated with the police and from that time onwards acted under the directions of the police. At 10 a.m. on November 12, one of the ladies received a letter addressed to Miss Fish. That letter was wrapped up in a copy of a newspaper and put through the letter-box by night. The letter read: "Miss Fish, Saw you safely home this morning at 10.15 a.m. No harm will come to you and your sister if you do exactly as we tell you. After this you'll never see us again as we are catching 12.5 from Euston, but if you try to inform anybody or police Heaven help you. At 10.10 to-night turn left by the traffic lights, Beaconsfield Road, walk on the left side of the road near the kerb, money in your right hand in brown paper. If you comply with our request we'll send you a card from abroad, but if not we'll send you death, not merely fooling (Visitor). Keep on walking until someone takes the parcel from your right hand, and don't look back. It'll mean death and more than that to your sister. We'll see whether you be wise." That letter was handed to the police, but the appellant persisted in his conduct, and on November 13, a letter was received by Miss Fish, which said: "Why did

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you stop behind that van last night and not keep on walking as you were told? There were far too many cars and men around that corner for my liking—if you were trying any funny business. I shall give you just one more chance; if you fail, you'll be sorry for ever. Put the package on the right-hand top hinge inside your gate, hang it up at exactly 10.20 p.m. to-night. That's the last chance you'll get; if you fail we'll call personally, police or no police."

Apparently the appellant fulfilled what he had threatened, because at 10.5 p.m. on November 13 he was seen by one of the police officers who were keeping watch in the grounds of the Misses Fish's house to crawl across a flower-bed from the garden of another house. He was arrested, and it was found that he had a bicycle outside a public-house. His bedroom was searched and there was found a piece of blotting paper or a blotting pad, and an exercise book from which certain sheets were torn. It was perfectly obvious he was the writer of the letters.

This is, in the opinion of the Court, a very grave case. It is quite plain that the appellant had made up his mind to put the two ladies in bodily fear and he succeeded in so doing by entering the house wearing a mask, carrying a pistol, and threatening to shoot unless £150 were provided. Then, as the letters show, he dogged their steps and pursued them with one threat after another. If it had not been for great fortitude and determination on the part of both sisters he would undoubtedly have accomplished his purpose. He has said here, as he said at the Central Criminal Court, that he was driven to desperation by the needs of his sister and a young woman to whom he was engaged to be married. He was in fact in employment and earning substantial wages. His previous character affords no excuse for the dastardly crime which he had carefully thought out. The Recorder, in passing sentence, reminded the appellant that the offence which he had admitted rendered him liable to penal servitude for life and

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ultimately sentenced him to eighteen months' imprisonment with hard labour.

The appellant sought leave to appeal against his sentence and he was warned that if he persisted in his appeal against sentence it would be the duty of the Court to pass such sentence as appeared to the Court to be right. Notwithstanding that clear warning he did persist in his appeal, and has now repeated the excuse, such as it was, which he offered in the Court below. The Court has carefully considered the matter. The appellant was guilty of one of the gravest crimes known to the law and, in view of the circumstances of the crime, the persistence with which it was continued and the aggravated nature of the offence, we are satisfied that the least sentence which he ought to undergo is a sentence of three years' penal servitude. The sentence will run from December 1, 1936.

Sentence increased.

BEFORE

Mr. JUSTICE SWIFT, Mr. JUSTICE FINLAY AND Mr. JUSTICE GODDARD.

HYMAN KURASCH.

1937.
22 & 23 *Feb.*

Evidence—Property Found in Prisoner's House—Larceny by a Trick—Pretended Sale of Kruger Sovereigns—Discovery of Similar Sovereigns in Bag Belonging to Servant of Prisoner's Wife—Admissibility.

The appellant was charged with larceny and conspiracy to steal, the allegation of the prosecution being that he, in concert with other persons charged together with him, had obtained a large sum of money by means of a trick in connection with the pretended sale of a number of Kruger sovereigns. Evidence was tendered by the prosecution that

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several Kruger sovereigns had been found by the police in the appellant's house in a bag belonging to a servant of his wife, but was excluded on objection being taken by the defence.

Held, the evidence was relevant to the charge and should have been admitted.

Appeal against conviction and sentence.

The appellant was charged at Plymouth Quarter Sessions on January 8, 1937, together with two men named Carter and Wildman, with larceny and conspiracy to steal. Carter pleaded guilty, and was sentenced by the Recorder to concurrent terms of three years' penal servitude and two years' imprisonment with hard labour, to commence at the expiration of a sentence of four years' penal servitude which he was then serving. The appellant and Wildman both pleaded not guilty, and both were convicted. Wildman was sentenced to concurrent terms of eighteen months' and six months' imprisonment, in each case with hard labour; the appellant to concurrent terms of five years' penal servitude and two years' imprisonment with hard labour.

The following statement of the facts is, in substance, taken from the judgment:—

A singularly ingenious theft was perpetrated by the appellant and his fellow-prisoners. The bait was laid for the theft by one of the conspirators going to a doctor in Devonport for the purpose of consulting him and producing a Kruger sovereign. Some discussion then arose about the coin, and it was suggested to the doctor that he might desire to purchase a number of them. The doctor said that he did not deal himself with such matters, but that he had a friend who might be interested. Thereupon an arrangement was made for a meeting, which took place on September 30, 1936. At that meeting the appellant remained outside in a car while the other two conspirators went into the house.

Then a most ingenious conjuring trick took place. It was suggested to the doctor that he should put away some

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of the sovereigns, and £2,300 in notes which he and his friend were prepared to pay in respect of the purchase, and that those things should be locked away in a drawer in the doctor's room while the two conspirators went away and fetched the other sovereigns, which, they said, they had not brought with them. One of the conspirators, by an ingenious device, then succeeded in substituting for the notes for £2,300 a number of pieces of paper.

At the trial a detective-inspector of the Metropolitan Police was called by the prosecution, and said that he had visited the appellant's house. Objection was taken to his evidence, but before the Recorder had ruled on its admissibility, he volunteered the statement that he had there found nine Kruger sovereigns. These were in fact found in a bag belonging to a servant employed by the appellant's wife at a club which she was running. The Recorder ruled that the evidence was inadmissible, and warned the jury not to pay any regard to it.

Norman Birkett, K.C. (*Henry Elam* with him), for appellant:

The evidence of the finding of Kruger sovereigns in a bag belonging to a servant of the appellant's wife was inadmissible. In any event the proper method of proving the fact would have been for the prosecution to call the servant as a witness. The Recorder ruled that the evidence was inadmissible, but the mischief had already been done by the police officer stating the fact of discovery after the objection to the evidence had been taken and before the Recorder ruled on its admissibility. Moreover, after ruling that the evidence was inadmissible, the Recorder permitted the appellant to be cross-examined on this matter. The sentence was in all the circumstances too severe.

J. Scott Henderson, for the Crown, was not called on to argue.

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FINLAY, J. [after stating the facts of the case as set out above, and referring to the evidence]: It was not denied by Mr. Birkett that there was ample evidence on which the jury might properly find the appellant guilty. He rested the whole of his case on one submission. The matter arose in the following way. Detective-sergeant Hair, of the Metropolitan Police, was called as a witness by the prosecution, and at the very beginning of his evidence defending counsel objected to its admissibility. The evidence, which, in the opinion of the Court, was clearly admissible, was to the following effect. The sergeant said that he had been to a flat occupied by the appellant and his wife. He went on to say—and, unfortunately, said after objection had been taken and before there had been any ruling by the Recorder—that he had there found nine Kruger sovereigns. It appears that the sovereigns were found in a bag which belonged to a girl or woman employed by the appellant's wife at some club which the wife was running. The Recorder, after hearing argument, upheld defending counsel's objection and excluded the evidence, and more than once warned the jury that the evidence ought to be omitted from their consideration.

If this Court had been of opinion that the evidence ought to have been excluded, we would have had carefully to consider whether, having regard to the reiterated warning of the Recorder, the jury had allowed themselves improperly to be influenced by evidence which they had been told to disregard. But the matter does not arise. It is impossible to say that the evidence was not material and not admissible. The principle is perfectly familiar. Where a prisoner is charged with housebreaking, it is clearly relevant to give evidence of housebreaking implements having been found in his house, whether they were merely lying in the house, or in the possession of his wife, or in a bag belonging to a servant of his wife. The mere discovery of the implements in the house would be admissible in evidence. In the present

case a vital matter for the prosecution to prove was possession of Kruger sovereigns by the appellant, and it is impossible to say that the fact that a police officer, on going to the appellant's house, had found such sovereigns in the possession of a servant of his wife was not relevant evidence.

In the opinion of the Court the whole matter arises out of a mistake. The Court appreciates the anxious care with which the Recorder excluded evidence to which, in his view, any possible objection might be taken. When, however, it is sought to appeal against conviction on the ground that the answer which the officer in fact gave was inadmissible, the Court is bound to say that the whole matter is founded on a mistake, and that the evidence to which that answer relates was plainly admissible. That is the only point on which Mr. Birkett relied, and it is sufficient to say that the point quite clearly fails, and that there was ample evidence on which the appellant could properly be convicted.

[His Lordship then dealt with the question of sentence, and said that in the opinion of the Court there were no grounds for interfering with the sentence passed.]

Appeal dismissed.

(An appeal by Carter against his sentence was also dismissed.)

Solicitors.—J. Albert Davis & Co., for appellant.

BEFORE

Mr. JUSTICE SWIFT, Mr. JUSTICE FINLAY AND Mr. JUSTICE GODDARD.

1937.
23 *February.*

JACK RIORDAN.

Sentence — Detention in Borstal Institution — Committal to Quarter Sessions for Sentence—Duty of Quarter Sessions to inquire into Circumstances of Case—Desirability of Counsel being instructed to prosecute at Quarter Sessions—Criminal Justice Administration Act, 1914 (*4 & 5 Geo. 5, c. 58*), *s.* 10 (1), *as amended by Criminal Justice Act*, 1925 (*15 & 16 Geo. 5, c. 86*), *s.* 46 (1).

When a prisoner is committed by a Court of summary jurisdiction to quarter sessions with a view to his being sentenced to detention in a Borstal institution, it is the duty of the Court of quarter sessions, before passing sentence, to examine into the circumstances of the conviction at petty sessions and to obtain information with regard to the previous conviction or convictions of the prisoner.

HOLDING (1934), 25 Cr. App. R. 208, applied.

Observations on the desirability of counsel being instructed to prosecute at quarter sessions in such cases.

Appeal against sentence.

The appellant, who was aged sixteen, was on November 17, 1936, convicted at Anerley Juvenile Court of larceny and was committed to West Kent Quarter Sessions, under section 10 (1) of the Criminal Justice Administration Act, 1914, as amended by section 46 (1) of the Criminal Justice Act, 1925 (*a*), with a view to his being sentenced to

(*a*) By the Criminal Justice Administration Act, 1914, s. 10 (1), as amended by the Criminal Justice Act, 1925, s. 46: "Where a person is summarily convicted of any offence for which the court has power to impose a sentence of imprisonment for one month or upwards without the option of a fine, and (a) it appears to the court that the offender is not less than sixteen nor more than twenty-one years of age; and (b) it is proved that the offender has been previously convicted of any offence or, that

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detention in a Borstal institution. On January 14, 1937, he was sentenced by the Chairman to be detained in a Borstal institution for a period not exceeding three years.

At the particular quarter sessions counsel were not ordinarily instructed to prosecute in such cases. In accordance with the usual practice of the Court, the Clerk of the Court stated to the magistrates the circumstances in which the appellant appeared for sentence. Such statement was, according to the appellant's notice of appeal, not within the appellant's hearing. A police officer then gave evidence, and stated the dates of three previous convictions of the appellant and the offence of which he had been convicted on each occasion, but did not deal with the offence in respect of which he had been committed for sentence. The officer also gave evidence of the appellant's home conditions. The appellant's father addressed the Court, but the appellant was not asked whether he wished to say anything himself.

Henry Elam, for appellant:

There were material irregularities in the proceedings at

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having been previously discharged on probation, he failed to observe a condition of his recognisance; and (c) it appears to the court that by reason of the offender's criminal habits or tendencies, or association with persons of bad character, it is expedient that he should be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime, it shall be lawful to the court, in lieu of passing sentence, to commit the offender to prison until the next assizes or quarter sessions, whichever appears to the court to be more convenient, and the court of assize or court of quarter sessions, as the case may be, shall inquire into the circumstances of the case, and, if it appears to the court that the offender is of such age as aforesaid and that for any such reason as aforesaid it is expedient that the offender should be subject to such detention as aforesaid, shall pass such sentence of detention in a Borstal institution as is authorised by Part I of the Prevention of Crime Act, 1908, as amended by this Act . . . "

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quarter sessions. There was no proper inquiry by the Court into the circumstances of the case, though this is required by section 10 (1) of the Criminal Justice Administration Act, 1914 (as amended). The facts which gave rise to the conviction were stated to the magistrates by the Clerk of the Court with his back to the dock, and the appellant was unable to hear what he said, and a police officer then went into the witness-box. It is, apparently, not the practice to instruct counsel to prosecute in such cases.

[SWIFT, J.: Let us hope that that very bad system will be altered and that counsel will be instructed to prosecute in all cases in which the liberty of young persons is concerned. Such cases ought to be a matter for the gravest consideration.]

Further, the appellant himself was given no opportunity of addressing the Court, and the conviction in respect of which he appeared for sentence was not strictly proved.

Maxwell Turner, for the Crown:

At the particular sessions counsel are not ordinarily instructed to prosecute in such cases, but they are if there appears to be any point of difficulty. Normally the Clerk of the Court informs the magistrates how the prisoner comes to be there, and it is left to the police to prosecute. In the circumstances it is not sought to support the sentence passed on the appellant.

SWIFT, J.: This appellant was committed from Anerley Juvenile Court to West Kent Quarter Sessions with a view to his being there dealt with by sentence of detention in a Borstal institution, if the Court should think right.

[His Lordship read section 10 (1) of the Criminal Justice Administration Act, 1914, as amended by section 46 of the Criminal Justice Act, 1925, and continued:] The whole foundation for the exercise of that jurisdiction is that the Court which passes sentence should inquire into the circumstances of the case. Similar legislation is to be found in

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section 10 of the Vagrancy Act, 1824. That section has recently been considered by this Court in HOLDING (1934), 25 Cr. App. R. 28, at p. 30, where, in the course of delivering the judgment of the Court, the Lord Chief Justice said: "The Court below appear entirely to have ignored their duty under section 10 of the Vagrancy Act, 1824, of examining into the circumstances of the case. There is nothing here which can be called an examination into the circumstances of the case. To judge from this case and so many others which have come before this Court, there is an impression abroad that, when a prisoner is sent to quarter sessions to be dealt with as an incorrigible rogue, the only duty of the Court is to pass the maximum sentence of twelve months' imprisonment with hard labour. Their first duty is to examine into the circumstances of the case and their second is to consider what is the appropriate sentence."

The principle of that judgment applies equally to the present case. The Court of quarter sessions was under a duty, before passing sentence, of making proper inquiries into all the circumstances of the case. They should have had before them not only the circumstances in which the appellant was convicted at petty sessions, but also such information as they thought right to demand with regard to his previous convictions, of which there were three. There was no sort of examination into those matters. The whole case was dealt with in a manner which is most unsatisfactory. For some reason or other the magistrates at these particular quarter sessions do not ordinarily allow the appearance of counsel on behalf of the prosecution in such cases. The Clerk of the Court states such matters as have to be stated, and then a police officer gives evidence.

We can imagine nothing which would make a person accused of crime feel more uncomfortable about the justice which is being administered to him than to see, without being able to hear, the Clerk of the Court obviously making some communication about him to the magistrates who are

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going to deal with him. Justice should not only be done, but should also be seen to be done, and we can imagine nothing more unfortunate than the manner in which it was dealt out to the present appellant. In the view of the Court this sentence ought not to stand, and the order of the Court is that the sentence be quashed and the appellant discharged.

Sentence quashed.

Solicitor for the Crown : Solicitor for Metropolitan Police.

[IN THE HOUSE OF LORDS.]

BEFORE

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Manslaughter—Unintentional Killing by Negligence—Motor Car—Dangerous Driving—Degrees of Negligence Necessary to Constitute Respective Offences—Summing Up—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 11—*Road Traffic Act,* 1934 (*a*) (24 *&* 25 *Geo.* 5, *c.* 50) *s.* 34.

The standard of negligence required to constitute the offence of dangerous driving, contrary to s. 11 of the Road Traffic Act, 1930, is not the same as that required to constitute the offence of manslaughter arising out of the negligent driving of a motor vehicle. A person may drive a motor vehicle at a speed or in a manner dangerous to the public within the meaning of the above section and cause death thereby, and yet not be guilty of manslaughter.

(*a*) By the Road Traffic Act, 1934, s. 34 : "Upon the trial of a person who is indicted for manslaughter in connection with the driving of a motor vehicle by him, it shall be lawful for the jury, if they are satisfied that he is guilty of an offence under section 11 of the principal Act [the Road Traffic Act, 1930,] (which relates to reckless or dangerous driving) to find him guilty of that offence, whether or not the requirements of section 21 of the principal Act (which relates to notice of prosecutions) have been satisfied as respects that offence."

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In directing a jury on a charge of manslaughter arising out of a motor accident, the Judge should, therefore, first tell the jury that the very high degree of negligence indicated in BATEMAN (19 Cr. App. R. 8) must be proved in order to establish the crime of manslaughter, and then go on to explain that that degree of negligence is not necessarily the same as that which is required to constitute the offence of dangerous driving, and then indicate the circumstances in which the jury would be entitled to acquit of manslaughter and convict of dangerous driving.

Appeal by the prisoner from order of the Court of Criminal Appeal dismissing his appeal against conviction.

The appellant, Wilfred Andrews, was convicted at Leeds Assizes on December 3, 1936, of manslaughter, and was sentenced by du Parcq, J., to fifteen months' imprisonment and to disqualification for life for holding a driving licence.

The following statement of facts is taken from the opinion of Lord Atkin:—

The appellant, a man aged 37, was employed by the Leeds Corporation Transport Department at their Donisthorpe Garage. On Saturday, June 27, at about 10.30 p.m., he was directed to take a van to assist a corporation omnibus which had broken down at Whingate, about three to four miles away. About 10.45 a man named Binks was driving a saloon car down the Tong Road away from Leeds at about ten miles an hour. He noticed about thirty yards ahead Craven crossing the road from Binks's near side. The road is about 29ft wide. The appellant, driving fast, over thirty miles an hour, overtook Binks's car, and driving well over on the off side of the road ran into Craven, who was then within three or four paces of the kerb. He was carried on the bonnet for a short period, thrown forward, and run over by the van. The appellant, who immediately after the accident nearly ran into a pedal cyclist, did not stop. He returned to the garage after 11, stating that he had not found the omnibus.

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When challenged a day or two later, the appellant denied that he had travelled along the Tong Road on the Saturday night. At the trial he said he was unable to remember the journey at all. There was no dispute that in fact the appellant was driving the van which killed Craven. The road was well lighted and there were people about.

The following passages occurred in the summing-up of du Parcq, J.:

" The law is this, that if a man is doing an unlawful act —if he is doing something which the law says that he must not do—and because he is doing it and in the course of doing it he kills somebody, then he is guilty not only of that unlawful act, but of manslaughter." . . . " If he is driving [a motor vehicle] recklessly, he commits an offence whether he kills anybody or whether he does not, but if because he is driving recklessly somebody is killed, then he is guilty of manslaughter." . . . " If you thought that although he drove recklessly, and although he drove at a speed or in a manner dangerous to the public, within the words of [section 11 of the Road Traffic Act, 1930,] but that it was not because of that that [the deceased] was killed, the law would entitle you to convict him not of manslaughter, but of dangerous driving. But in this case I am bound to tell you that if you think that he was driving recklessly and in a dangerous manner within the meaning of those words, and it was because of that that [the deceased] was killed, then it is your bounden duty to convict him of manslaughter."

The appellant appealed to the Court of Criminal Appeal —The Lord Chief Justice, Mr. Justice Swift, and Mr. Justice Goddard—who heard the appeal on January 26, 1937.

G. S. Waller, for appellant. The ground of the appeal is that the direction of the Judge was wrong in law in telling the jury that if the appellant was driving recklessly within the meaning of section 11 of the Road Traffic Act, 1930,

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and because he was so doing someone was killed, the appellant was guilty of manslaughter. It was at one time settled law that any unlawful act causing death amounted to manslaughter: SENIOR, [1899] 1 Q. B. 283, but this view of the law no longer obtains as a result of the decision of this Court in STRINGER (24 Cr. App. R. 30; [1933] 1 K. B. 704) and the passing of section 34 of the Road Traffic Act, 1934. In STRINGER (*supra*), it was held that a verdict of Not Guilty of manslaughter was not incompatible with a verdict of Guilty of dangerous driving on the same facts, and the reason must be that the *mens rea* necessary to constitute each offence is different.

[SWIFT, J.: The jury in that case may have acquitted of manslaughter because they were not satisfied that death resulted from the dangerous driving.]

There was no dispute in that case that death did result from the dangerous driving.

Manslaughter arising out of the driving of a motor car requires something more than an offence under section 11 of the Road Traffic Act, 1930, and death caused thereby. Otherwise, an offence of careless driving under section 12 which resulted in death would amount to manslaughter too, on the authority of SENIOR (*supra*).

[GODDARD, J.: The offence under section 12 is only a summary offence, and not an indictable misdemeanour.]

Further, if section 34 of the Road Traffic Act, 1934, did not purport to alter the law relating to manslaughter, it can only apply where the dangerous driving was not the cause of death. Such a contingency must be of so limited an occurrence that it can hardly be supposed that Parliament would have thought necessary to provide for it.

[THE LORD CHIEF JUSTICE: The section cannot be an invitation to a jury to return a verdict of Guilty of dangerous driving where they are satisfied that the prisoner is guilty of manslaughter. It must apply to cases where there is a lack of nexus between the dangerous driving and the death.]

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G. W. Wrangham for the Crown, was not called on to argue.

THE LORD CHIEF JUSTICE: This appellant was convicted at Leeds Assizes before du Parcq, J., of manslaughter. He was sentenced to fifteen months' imprisonment and was also disqualified from driving a motor car during his life. He now appeals against conviction, and the ground of his appeal is that the Judge misdirected the jury.

The facts of the case were simple and clear. [His Lordship stated them, and continued.] The complaint is that the Judge did not adequately direct the jury, or misdirected them, on the law relating to manslaughter. Mr. Waller has put that complaint very clearly in his ingenious and attractive argument, and the complaint is crystallised in a passage, reiterating another passage, which occurs at the conclusion of the very careful summing-up. [His Lordship then read the last of the two passages from the summing-up set out above, and continued.] The argument developed by Mr. Waller sometimes says and sometimes suggests that there has been a change in the law relating to crimes of this kind. This Court is not conscious of any such change. The considered judgment of this Court in BATEMAN (1925), 19 Cr. App. R. 8, remains as it was at the time of its delivery. It is a little important to bear in mind that the topic there being dealt with was the true difference between negligence which gives rise to a claim for compensation on the part of an individual and negligence which calls for correction on the part of the State, and the passage which put the matter as concisely as it can be put is as follows (p. 13): "The foregoing observations deal with civil liability. To support an indictment for manslaughter the prosecution must prove the matters necessary to establish civil liability (except pecuniary loss), and, in addition, must satisfy the jury that the negligence or incompetence of the accused went beyond a mere matter of compensation and showed such disregard

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for the life and safety of others as to amount to a crime against the State and conduct deserving punishment." For those last words might properly be substituted the words "and to call for a conviction", because to speak of punishment in that context might appear to convey to a careless mind some confusion between the function of the jury and the function of the Judge. Apart from that trifling variation, there is the statement of the law

Then there comes a series of cases, which are commonly called "motor manslaughter cases", that is to say, cases where death has been brought about in connection with or by reason of the driving of a motor car, and our attention has been directed to STRINGER (*supra*), the judgment in which remains unimpaired.

After the decision in that case there was enacted in the Road Traffic Act, 1934, a particular section which seems to have given rise to some misapprehension. [His Lordship read section 34 and continued.] It would be idle and indeed improper to speculate on the reasons why the Legislature enacted that section. All this Court has to do is to observe the section which has been enacted. It would be strange, and in our opinion wrong, to put upon that section an interpretation which involves either of two conclusions—either that by enacting that section Parliament was intending to vary the criminal law under the head of manslaughter, or that Parliament was inviting a jury who were satisfied that a prisoner had committed manslaughter to refuse to convict of manslaughter and to convict instead of the offence of reckless or dangerous driving. It seems to this Court that that section is plainly an enabling section, and enables a jury upon the trial of a person charged with manslaughter to convict of reckless or dangerous driving notwithstanding that notice of prosecution for reckless or dangerous driving under the principal Act has not been given.

In our view the Judge was perfectly correct in his summing-up, and there is no reason for interfering with the

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conviction. It is not even sought to vary the sentence passed. The appeal must be dismissed.

The prisoner appealed to the House of Lords under a fiat given by the Attorney-General.

G. Russell Vick, K.C., for the appellant. The law with regard to involuntary manslaughter is not well settled. It appears to be clear that an unlawful act causing death justifies a verdict of manslaughter, but it is not clear what amounts to an unlawful act. In early days the term received a very wide definition. [He referred to Hale's Pleas of the Crown (Vol. 1, pp. 475-6); Foster's Crown Law (pp. 258, 261); East's Pleas of the Crown (Vol. 1, pp. 255-263); FENTON (1830) (1 Lewin C.C. 179); SULLIVAN (1836) (7 Car. and P. 641), and PACKARD (1841) (Car. and M. 236).] The law has, however, subsequently changed. It was held for the first time in FRANKLIN (1883), 15 Cox C. C. 163, that mere civil trespass was not a sufficient ground on which to base a charge of manslaughter, though in Stephen's *Digest of the Criminal Law* (1926 ed., art. 294), in addition to acts punishable as crimes, acts constituting actionable wrongs were included in the category of unlawful acts which might give rise to manslaughter, the statement being, presumably, based on the older authorities. In SENIOR (1899), 1 Q. B. 283, it was apparently laid down that any breach of statute which caused death would amount to manslaughter, whether the act forbidden gave rise to a summary or to an indictable offence. It appeared, too, to be established by that date that in all cases where an improper way of doing a lawful act had been made the basis of a charge of manslaughter, the degree of impropriety was a material fact, and that the question whether the degree was sufficient to constitute manslaughter was one for the jury.

The law, however, as laid down in SENIOR (*supra*), has undergone a change in view of recent legislation

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relating to motor car offences. There is no reason to suppose that in the year 1900 the Judges envisaged new statutes relating to new methods of transport. The effect of the recent decision in STRINGER (*supra*), was that if a jury returned a verdict of not guilty of manslaughter and guilty of dangerous driving on the same facts, death having been admittedly caused by the driving, those verdicts were not inconsistent. The reason must be that there is a difference in the degree of negligence necessary to constitute the respective offences. [He referred also to BATEMAN (*supra*).]

With regard to the application of section 34 of the Road Traffic Act, 1934, different Judges have taken different views, but the section shows that Parliament is still desirous of leaving to the jury the question whether the negligence proved in any case, although sufficient to create a statutory offence, goes further and is sufficient to establish the crime of manslaughter. This question was, in effect, withdrawn from the jury by du Parcq, J., in his summing-up, and there appears to be some inconsistency between directions contained in recent summings-up relating to the kind of unlawful act which is sufficient to constitute manslaughter. [He criticised various passages in the summing-up.]

G. S. Waller, following for the appellant:

There may be a degree even of reckless driving resulting in death which falls short of manslaughter. If the law is that any reckless or dangerous driving which causes death amounts to manslaughter, section 34 of the Road Traffic Act, 1934, can only be given one of three possible interpretations: (1) if at the moment of impact the driver was driving carefully, but there was some antecedent or subsequent dangerous driving on his part, then he may be found guilty of that dangerous driving; (2) the application of the section must be limited to a case where death was not caused by the dangerous driving; (3) in a case where the elements of manslaughter are present, if there are also

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present some mitigating circumstances, such as the youth of the driver, then the jury are entitled to convict of the lesser offence only. None of these interpretations can be considered satisfactory. [He referred to a number of summings-up at Assizes which were within his recollection and the manner in which different Judges had dealt with the interpretation to be placed on the above section.] The trend of authority has been to increase the degree of negligence necessary to establish the crime of manslaughter.

The Solicitor-General (*Sir Terence O'Connor, K.C.*) (*Arthur Morley, K.C.* and *G. W. Wrangham* with him), for the Crown:

If the summing-up be regarded as a whole, it will be found that the Judge rightly directed the jury on the degree of culpability which should attach to the crime of manslaughter. If the matter rested on the direction given in the first of the passages cited above, it might well be that the proposition of law therein contained could not be considered entirely satisfactory. The Judge, however, deviated from that proposition in subsequent passages. On several later occasions he used words which were completely apt to exclude cases arising under section 12 of the Road Traffic Act, 1930 [*i.e.*, where the driving had merely been without due care and attention] from the degree of criminality necessary to constitute manslaughter. At the very end of the summing-up there is a passage extremely favourable to the appellant, in which the Judge emphasised the necessity of both limbs of section 11 being established—that is to say, both reckless *and* dangerous driving—if the jury were to convict of manslaughter.

With regard to the general law of manslaughter, the old writers divide homicide into voluntary and involuntary homicide. It is not necessary to consider the voluntary types, as the whole of the doctrine which has created the modern difficulties arises out of the sub-divisions of

involuntary homicide which the old writers adopted. These were twofold: (1) Homicide arising from the doing of an act in itself lawful, which was homicide *per infortunium*; and (2) homicide arising from the doing of an unlawful act, which was manslaughter. There has, however, been no agreement on what constitutes an unlawful act. Stephen in his *Digest of the Criminal Law* (1926 ed. arts. 294 and 314) derived from the old authorities the inclusion of almost every kind of wrongful act under the head of "unlawful act." [He referred also to Foster's *Crown Law* (page 290), East's *Pleas of the Crown* (Vol. 1, pp. 257, 261), and Blackstone's *Commentaries* (1884 ed., Ch. XIV, p. 192).] It is submitted, however, that unlawful acts can be classified under two distinct heads. The first includes all acts which are intrinsically unlawful, and the second all acts which are in their nature lawful, but become unlawful because they are done negligently. Where an act is in itself lawful the duty to exercise care may arise either because responsibilities are undertaken or because the act itself is a potential danger unless done with care. BATEMAN (*supra*) properly falls within the first of these two last-mentioned heads. The pristine rigour of the old law was diminished as time went on by a very strict insistence on the causal chain being proved, and that is really the explanation of the decision in FRANKLIN (*supra*).

With regard to the interpretation of section 34 of the Road Traffic Act, 1934, the section enables an act of dangerous driving to be punished where it is not linked up with the death, *e.g.*, where it occurred at a time antecedent to the death. Where, however, recklessness of behaviour is proved, and death results, there is always an ample degree of culpability to establish the crime of manslaughter. It is conceded, however, that the same principle may not always apply to a case of dangerous, as distinct from reckless, driving. The question of the degree of negligence which will support a charge of manslaughter is one for

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the jury and no artificial classification of negligence into different categories is necessary or desirable. [He was stopped.]

G. Russell Vick, K.C., in reply:

The Judge in his summing-up, after referring to section 34 of the Act of 1934, in effect told the jury that on the facts of the case before them they had no discretion left to return a verdict on the lesser charge. The summing-up should, however, have dealt first with the question of manslaughter, and then passed to the alternative verdicts open to the jury under section 34. The jury should have been asked to say: Was the appellant guilty of (a) manslaughter; or (b) reckless driving; or (c) dangerous driving? There must be a difference in the degree of negligence necessary to constitute the respective offences. It is worthy of note that the Motor Car Act, 1903, s. 1, fixed one common penalty for reckless, dangerous or negligent driving, but that in the Road Traffic Act, 1930, the term "negligent driving" has dropped out, and the distinct offences of "reckless driving", "dangerous driving", and "driving without due care and attention" have been created.

LORD ATKIN: I think all your Lordships have come to the conclusion that this appeal ought to be dismissed, but inasmuch as the case involves matters of public interest and there has been a very careful argument addressed to your Lordships with regard to the whole law of manslaughter, it seems desirable that your Lordships should take some little time to put into writing the reasons for which you have arrived at that conclusion.

In accordance, however, with the practice which is convenient in criminal cases, it is better that the decision that the appeal be dismissed be given now. In the special circumstances of the case, the sentence will run from the date of conviction.

The House took time for consideration.

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April 22.—LORD ATKIN: My Lords,—This is an appeal under the necessary certificate of the Attorney-General from an order of the Court of Criminal Appeal dismissing an appeal by the appellant from conviction on a charge of manslaughter. The appellant was tried before du Parcq, J., at Leeds Assizes in December, 1936, and being convicted was sentenced to be imprisoned for fifteen months and was disqualified for life from holding a motor driving licence.

He was indicted for manslaughter, the particulars of offence being that on June 27, 1936, he unlawfully killed William Burton Craven. The appeal is based solely on an alleged misdirection and no issue is raised as to the facts, which can be stated shortly.

[His Lordship then stated the facts as set out above and continued:] On these facts there would appear to have been a very clear case of manslaughter, and the only question which arises is whether the learned Judge correctly directed the jury.

Of all crimes manslaughter appears to afford most difficulties of definition, for it concerns homicide in so many and so varying conditions. From the early days, when any homicide involved penalty, the law has gradually evolved "through successive differentiations and integrations" until it recognises murder on the one hand, based mainly, though not exclusively, on an intention to kill, and manslaughter on the other hand, based mainly, though not exclusively, on the absence of intention to kill but with the presence of an element of "unlawfulness" which is the elusive factor. In the present case it is only necessary to consider manslaughter from the point of view of an unintentional killing caused by negligence, that is, the omission of a duty to take care.

I do not propose to discuss the development of this branch of the subject as treated in the successive treatises of Coke, Hale, Foster, and East, and in the judgments of

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the Courts to be found either in directions to juries by individual Judges, or in the more considered pronouncements of the body of Judges which preceded the formal Court of Crown Cases Reserved. Expressions will be found which indicate that to cause death by any lack of due care will amount to manslaughter, but as manners softened and the law became more humane a narrower criterion appeared. After all, manslaughter is a felony, and was capital, and men shrank from attaching the serious consequences of a conviction for felony to results produced by mere inadvertence. The stricter view became apparent in prosecutions of medical men or men who professed medical or surgical skill for manslaughter by reason of negligence. As an instance I will cite WILLIAMSON (1807) (3 C. & P. 635), where a man who practised as an accoucheur, owing to a mistake in his observation of the actual symptoms, inflicted on a patient terrible injuries from which she died. To substantiate the charge of manslaughter, Lord Ellenborough said "the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention."

The word "criminal" in any attempt to define a crime is perhaps not the most helpful, but it is plain that the Lord Chief Justice meant to indicate to the jury a high degree of negligence. So, at a much later date, in BATEMAN (1925) (19 Cr. App. R. 8) a charge of manslaughter was made against a qualified medical practitioner in similar circumstances to those of WILLIAMSON (*supra*). In a considered judgment of the Court the Lord Chief Justice, after pointing out that in a civil case, once negligence is proved, the degree of negligence is irrelevant, said (at p. 11): "In a criminal Court, on the contrary, the amount and degree of negligence are the determining question. There must be *mens rea*." After citing CAHILL *v.* WRIGHT (1856) (6 E. & B. 891), a civil case, the Lord Chief Justice proceeded: "In explaining to juries the test which they should

apply to determine whether the negligence, in the particular case, amounted or did not amount to a crime, the Judges have used many epithets, such as 'culpable', 'criminal', 'gross', 'wicked', 'clear', 'complete'. But, whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment."

Here again I think, with respect, that the expressions used are not, indeed they probably were not intended to be, a precise definition of the crime. I do not myself find the connotations of *mens rea* helpful in distinguishing between degrees of negligence, nor do the ideas of crime and punishment in themselves carry a jury much farther in deciding whether in a particular case the degree of negligence shown is a crime and deserves punishment. But the substance of the judgment is most valuable, and in my opinion is correct. In practice it has generally been adopted by Judges in charging juries in all cases of manslaughter by negligence, whether in driving vehicles or otherwise.

The principle to be observed is that cases of manslaughter in driving motor-cars are but instances of a general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied "reckless" most nearly covers the case. It is difficult to visualise a case of death caused by "reckless" driving in the connotation of that term in ordinary speech which would not justify a conviction of manslaughter. But

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it is probably not all-embracing, for " reckless " suggests an indifference to risk, whereas the accused may have appreciated the risk and intended to avoid it and yet shown such a high degree of negligence in the means adopted to avoid the risk as would justify a conviction. If the principle of BATEMAN (*supra*) is observed, it will appear that the law of manslaughter has not changed by the introduction of motor vehicles on the road. Death caused by their negligent driving, though unhappily much more frequent, is to be treated in law as death caused by any other form of negligence, and juries should be directed accordingly.

If this view be adopted it will be easier for Judges to disentangle themselves from the meshes of the Road Traffic Acts. Those Acts have provisions which regulate the degree of care to be taken in driving motor vehicles. They have no direct reference to causing death by negligence. Their prohibitions, while directed, no doubt, to cases of negligent driving, which if death be caused would justify convictions of manslaughter, extend to degrees of negligence of less gravity.

Section 12 of the Road Traffic Act, 1930, imposes a penalty for driving without due care or attention. This would apparently cover all degrees of negligence. Section 11 imposes a penalty for driving recklessly or at a speed or in a manner which is dangerous to the public. There can be no doubt that this section covers driving with such a high degree of negligence as that if death were caused the offender would have committed manslaughter. But the converse is not true, and it is perfectly possible that a man may drive at a speed or in a manner dangerous to the public and cause death and yet not be guilty of manslaughter.

The Legislature appears to recognise this by the provision in section 34 of the Road Traffic Act, 1934, that on an indictment for manslaughter a man may be convicted

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of dangerous driving. But, apart altogether from any inference to be drawn from section 34, I entertain no doubt that the statutory offence of dangerous driving may be committed, though the negligence is not of such a degree as would amount to manslaughter if death ensued. As an instance, in the course of argument it was suggested that a man might execute the dangerous manoeuvre of drawing out to pass a vehicle in front with another vehicle meeting him and be able to show that he would have succeeded in his calculated intention but for some increase of speed in the vehicles in front—a case very doubtfully of manslaughter but very probably of dangerous driving.

I cannot think of anything worse for users of the road than the conception that no one could be convicted of dangerous driving unless his negligence was so great that if he had caused death he must have been convicted of manslaughter. It therefore would appear that in directing the jury in a case of manslaughter the Judge should in the first instance charge them substantially in accordance with the general law, that is, requiring the high degree of negligence indicated in BATEMAN (*supra*), and then explain that that degree of negligence is not necessarily the same as that which is required for the offence of dangerous driving, and then indicate to them the conditions under which they might acquit of manslaughter and convict of dangerous driving. A direction that all they had to consider was whether death was caused by dangerous driving within section 11 of the Road Traffic Act, 1930, and no more would in my opinion be a misdirection.

In dealing with the summing-up in the present case I feel bound to say, with every respect to the learned and very careful Judge, that there are passages which are open to criticism. In particular at the beginning of his charge to the jury he began with the statement that if a man kills another in the course of doing an unlawful act he is guilty of manslaughter, and then proceeded to ascertain what the

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unlawful act was by considering section 11 of the Road Traffic Act, 1930. If the summing-up rested there there would have been misdirection. There is an obvious difference in the law of manslaughter between doing an unlawful act and doing a lawful act with a degree of carelessness which the Legislature makes criminal. If it were otherwise a man who killed another while driving without due care and attention would *ex necessitate* commit manslaughter. But as the summing-up proceeded, the learned Judge reverted to, and I think rested the case on, the principles which have been just stated. On many occasions he directed the attention of the jury to the recklessness and high degree of negligence which the prosecution alleged to have been proved and which would justify them in convicting the accused.

On consideration of the summing-up as a whole I am satisfied that the true question was ultimately left to the jury, and that on the evidence the verdict was inevitable. For these reasons I came to the conclusion that the appeal should be dismissed.

LORD THANKERTON: My Lords, I have had the privilege of considering the opinion which has just been delivered by the noble Lord on the Woolsack, and I desire to express my complete concurrence in it.

LORD WRIGHT, M.R.: My Lords, I also agree, and I am asked by my noble and learned friend Viscount Finlay, who has also had the privilege of considering the opinion which has just been delivered, to say that he agrees.

LORD ROCHE: My Lords, I also concur.

Appeal dismissed.

Solicitors: C. Butcher & Simon Burns, for Morrish, Nelson & Co., Leeds, for appellant.

[IN THE HOUSE OF LORDS.]

BEFORE

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By the Larceny Act, 1916, s. 29 (1): "Every person who (i) utters, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable and probable cause, any property or valuable thing . . . shall be guilty of felony. . . ."

Rule 14 (1) of the rules of a trade association provided: "No member of the association shall supply, directly or indirectly, any trade goods . . . to . . . any person whose name is placed upon the stop list. . . ." Rule 15 (1) provided that in case of a breach by any member of rule 14 (1) "the council or price protection committees shall have power . . . to make an order that the name of such member . . . be placed upon the stop list, unless within twenty-one days such member . . . pays to the association a fine within limits to be laid down by the council".

Held, an agent of the association might lawfully write requiring a person to pay a sum of money and give an undertaking to comply with the association's rules as an alternative to having his name put on the stop list. Although such a letter would constitute a demand of money with menaces, there would not be an absence of reasonable

* This civil case is included in these Reports as it decides an important question of criminal law, on which conflicting views had been expressed by the Court of Criminal Appeal and the Court of Appeal.

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and probable cause as long as the payment was demanded as part of or in furtherance of the promotion of the association's trade interests and the sum demanded was not extortionate.

DENYER (19 Cr. App. R. 93; [1926] 2 K. B. 258) disapproved.

The above rules and similar rules of any other trade association are, however, capable of being abused, and if they are so abused an offender may be liable under the section.

Semble, a mistaken but honest belief in the existence of facts, which, if they existed, would constitute a reasonable and probable cause for the demand, would constitute a defence to a charge under the above section.

DYMOND (15 Cr. App. R. 1; [1920] 2 K. B. 260) commented on.

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Rule 14 (1) of the rules of the Motor Trade Association provided: "No member of the association shall supply, directly or indirectly, any trade goods . . . to . . . any person whose name is placed upon the stop list except under a contract already existing which the member is, by law, obliged to fulfil. . . ." Rule 15 (1) provided: "In case of a breach by any member of rules . . . 14 (1) . . . the council or price protection committees shall have power . . . to make an order that the name of such member . . . be placed upon the stop list, unless within twenty-one days such member . . . pay to the association a fine within limits to be laid down by the council. . . ."

The plaintiff, William Treble Thorne, who was a member of the above association, brought a friendly test action against the association, in which he claimed a declaration that so much of rule 15 (1) as provided that the council or price protection committees of the association should have power to place a member on the stop list unless he paid the stipulated fine was illegal and/or *ultra vires*, having regard to the status and objects of the association, and an injunction to restrain the defendants from acting on the

power given by the rule. The defendants denied that the rule was illegal and/or *ultra vires*.

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The action came on for trial before MacKinnon, J., who gave judgment for the defendants, holding that he was bound by the decision of the Court of Appeal in HARDIE & LANE, LTD. *v.* CHILTON ([1928] 2 K. B. 306), where it was held that the association might lawfully ask a member to pay, and agree to accept, a fine for breaking a rule as an alternative to having his name placed on the stop list.

On appeal by the plaintiff to the Court of Appeal, the attention of the Court was directed to the conflict of judicial opinion arising from the decision of that Court in the above case and the decision of the Court of Criminal Appeal in DENYER (19 Cr. App. R. 93; [1926] 2 K. B. 258). The Court held that they were bound by the decision in HARDIE & LANE, LTD. *v.* CHILTON (*supra*) and dismissed the appeal.

The plaintiff appealed to the House of Lords. The plaintiff died while the action was pending, and his widow and executrix, Mrs. Elsie Dora Corry Thorne, was, by order of the Court, substituted as appellant.

Neville Laski, K.C., and *Richard Hurst*, for the appellant.

Sir William Jowitt, K.C., *Philip Levy*, and *P. I. V. Rippon*, for the respondents.

The House took time for consideration.

June 3. The following opinions were read:—

LORD ATKIN: My Lords, this is an appeal from an order of the Court of Appeal affirming a judgment in favour of the defendants given by MacKinnon, J., on April 29, 1936. The plaintiff is a member of the Motor Trade Association and the action was brought for a declaration that "so much of rule 15 (1) of the defendant association as provides that the council and price protection committees shall have power to make an order that the name of such member or person

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be placed upon the stop list unless within twenty-one days such member or person pay to the association a fine within limits to be laid down by the council is illegal and/or *ultra vires* having regard to the status and objects of the association ", and for an injunction to restrain the defendants from acting on the power so given. The action is in the nature of a friendly proceeding brought to determine a very practical difficulty which has arisen in the affairs of the association by reason of two decisions of the Courts which appeared to conflict. In DENYER (19 Cr. App. R. 93; [1926] 2 K. B. 258), in the Court of Criminal Appeal, one of the officials of the association who had acted under a similar rule had been convicted under section 29 (1) of the Larceny Act, 1916, of uttering a letter demanding money with menaces and without any reasonable or probable cause, and his conviction was upheld. In HARDIE & LANE, LTD. *v.* CHILTON ([1928] 2 K. B. 306), the plaintiffs sought to recover back money which had been demanded from them in similar circumstances to those in DENYER (*supra*). The Court of Appeal disagreed with the decision in DENYER (*supra*) and entered judgment for the defendant. It is not surprising, therefore, that the members of the association should desire to know where they stand. In the Courts below there was no argument, as the case was properly treated as being governed by the previous decision of the Court of Appeal. Before your Lordships the case was fully argued, and though it is probable that the appellant will suffer no depression of spirits if the appeal be dismissed, yet every relevant consideration was put before this House. No evidence was called at the trial, though your Lordships asked for and received copies of the resolutions of the association indicating how the rules are administered at present with regard to the limits of the amounts demanded. For the purposes of the case it is necessary to read rules 2, 3, 11, 12, 13 and Appendix 1, 14, 15, 16, 17, 18, 19, 20, 21, 22, 26.

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The question appears to be whether the effect of rule 15 (1) is such that, if the council or price protection committees make an order that the name of a member or non-member be placed on the stop list unless within twenty-one days such member or person pay to the association a fine as prescribed by the council and give the required undertaking, the person who writes on behalf of the association to demand the fine necessarily commits the offence constituted by section 29 (1) or section 31 of the Larceny Act, 1916. This House allowed an amendment to raise the effect of the last-mentioned section. If the rule can be administered without a criminal act, the present plaintiff must, in my opinion, fail. For it must not be imputed to the association that they would commit or authorise a crime when the powers given to them are capable of being exercised lawfully.

Is it true, then, that if the council as an alternative to putting the name of a person on the stop list require him to pay a limited sum, and to give an undertaking to comply with the terms of the rules, and write to the person to that effect, their agent is necessarily guilty of demanding money with menaces without reasonable or probable cause?

To my mind, the key to the situation is to be found in the fact that to put a man's name on a stop list in such circumstances as the present is not a wrongful act; it does not infringe any right of the person so pilloried. This seems to have been conclusively decided by WARE & DE FREVILLE, LTD. *v.* MOTOR TRADE ASSOCIATION ([1921] 3 K. B. 40), which was approved in this House in SORRELL *v.* SMITH ([1925] A. C. 700). It is an act done in lawful furtherance of business interests, and, though done in combination, is done without any express intent to injure the person whose name is published.

When the association write to what I will call an offender, announcing that they will put him on the stop list unless he pays a sum of money, I think that several of the elements

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of the offence under section 29 (1) exist. They seem to me to "menace" him with the stop list. If the matter came to us for decision for the first time, I think there would be something to be said for a construction of "menace" which connoted threats of violence and injury to person or property, and a contrast might be made between "menaces" and "threats" as used in other sections of the various statutes. But in several cases it has been decided that "menace" in this sub-section and its predecessors is simply equivalent to threat: TOMLINSON ([1895] 1 Q. B. 706), BOYLE AND MERCHANT (10 Cr. App. R. 180; [1914] 3 K. B. 339).

The Larceny Act, 1916, was passed after these decisions, and I think that they must be accepted; though possibly some of the expressions in some of the judgments are open to criticism. In WARE & DE FREVILLE, LTD. *v.* MOTOR TRADE ASSOCIATION (*supra*), and again in HARDIE & LANE, LTD. *v.* CHILTON (*supra*), Scrutton, L.J., appeared to indicate that if a man merely threatened to do that which he had a right to do the threat could not be a menace within the Act. With great respect, this seems to me to be plainly wrong, and I entirely agree with the criticism of this proposition made by the Lord Chief Justice in DENYER (*supra*). The ordinary blackmailer normally threatens to do what he has a perfect right to do—namely, communicate some compromising conduct to a person whose knowledge is likely to affect the person threatened. Often, indeed, he has not only the right but also the duty to make the disclosure, as of a felony, to the competent authorities. What he has to justify is not the threat, but the demand of money. The gravamen of the charge is the demand without reasonable or probable cause, and I cannot think that the mere fact that the threat is to do something which a person is entitled to do either causes the threat not to be a "menace" within the Act, or in itself provides a reasonable or probable cause for the demand.

It could not be contended that in writing such a letter as suggested the association would not be demanding money. It would be proved, therefore, that they uttered a letter demanding with menaces money, and that the only question is whether the demand would be without reasonable or probable cause. It is here that I am unable to agree with the decision in DENYER (*supra*). It appears to me that if a man may lawfully in the furtherance of business interests do acts which will seriously injure another in his business he may also lawfully, if he is still acting in furtherance of his business interest, offer that other to accept a sum of money as an alternative to doing the injurious acts. He must, no doubt, be acting not for the mere purpose of putting money in his pocket, but for some legitimate purpose other than the mere acquisition of money. In the present case the rules empower the council and the committees to demand sums "within limits" as an alternative to the stop list.

It is obvious that a reasonable construction of the rules leads to the inference that the intention is to deter persons in the trade from violating recognised conventions as to maintaining list prices and the like; to give the council power to preclude all traders from commerce with the offender; but to allow the council to mitigate the grave penalty of the stop list by substituting a money payment and an undertaking not to offend again. If the council *bona fide* exercised this power with the *bona fide* intention only of carrying out this trade policy, in my opinion they would not be demanding the payment without reasonable and probable cause. It is impossible to assume that the rules must necessarily be abused and, as the power given can be exercised lawfully, it cannot be said that they are *ultra vires*. By consent of the parties resolutions of the council were produced indicating what appeared to be reasonable limits for the sums to be demanded, varying as the supposed offence was a first or second offence, and so on. I do not

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think that the actual limits fixed should determine the question as to the validity of rules giving power to demand sums within limits to be fixed. It is plain that these rules and any similar rules of any other association in any other trade are capable of being abused, and, if so, nothing in this decision will prevent offenders from being subject to the criminal law.

But if the rules were genuinely enforced, I am satisfied that there would not be, as, in my opinion, in DENYER (*supra*) there was not, any evidence of an absence of reasonable or probable cause. It follows from what I have said that I cannot agree with the judgment in DENYER (*supra*), that there was no nexus or relationship between a right to put the name of Mr. Read (the alleged offender) on the stop list and a right to demand from him £257 as the price of abstaining from that course. I think that the final passage from the summing up of Talbot, J., cited in the judgment of the Court of Criminal Appeal (19 Cr. App. R., at p. 100; [1926] 2 K. B., at p. 269) was wrong. It is the excessive width of the proposition there stated that seems to me to constitute the flaw in the reasoning in that case throughout. I think that the absence of reasonable or probable cause in a criminal charge under this sub-section is a question of fact for the jury. But, if the cause is reasonably capable of being associated with the promotion of lawful business interests, the Judge should not allow the case to go to the jury if there is no evidence of the accused's intention going beyond such lawful business interests.

I only wish to add a word as to the case of DYMOND (15 Cr. App. R. 1; [1920] 2 K. B. 260), referred to in the argument, which may have a bearing on cases to be tried under this section. In that case the prisoner was charged under this sub-section. Her defence was that she had been indecently assaulted by the prosecutor and that she thought she had a right to demand money from him in compensa-

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tion. The learned Judge at Assizes, Darling, J., had refused to allow evidence to be called either as to the fact or as to her belief. The argument for the Crown was that an indecent assault differed from a common assault, and that even if the accused woman had been assaulted it would not justify a claim for compensation and that her belief that it would was irrelevant. The Court agreed with this contention, and I express no opinion on it. But language was used in the judgment which seemed to indicate that even if the mistake were as to a fact which would have constituted a reasonable cause such a mistake would be irrelevant; in other words, there must be in fact a cause, not merely a genuine belief in a cause. This seems to me incautiously expressed; and I do not think that doubt should exist on a well-established proposition in criminal law that normally a genuine belief in the existence of facts, as apart from law, which if they existed would constitute a defence, is itself a sufficient defence.

I think this appeal should be dismissed, with costs.

LORD THANKERTON: My Lords, I find myself in agreement with the opinions of my noble and learned friends, which I have had the privilege of considering, and I will add only a few observations, as the appeal raises an apparent conflict of view between the Court of Criminal Appeal and the Court of Appeal in the criminal case of DENYER (19 Cr. App. R. 93; [1926] 2 K. B. 258) and the civil case of HARDIE & LANE, LTD. *v.* CHILTON ([1928] 2 K. B. 306) respectively.

The appellant seeks a declaration that rule 15 (1) of the rules of the association is illegal and/or *ultra vires* in so far as it empowers the council or price protection committees, as an alternative to placing the offending person—whether a member or not—on the stop list, to make an order that the name of such person be placed on the stop list unless

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within twenty-one days he pay to the association a fine to be fixed as provided for.

The only ground submitted by the appellant was that the pronouncing of such an order would necessarily constitute a felony within the meaning of section 29 (1) of the Larceny Act, 1916. In other words, the appellant undertakes to satisfy your Lordships that no such order could be made without committing a felony. I agree with your Lordships that the appellant has failed to do so, but it does not follow from the refusal to give the declaration sought by the appellant that such order could not be made under such circumstances as might bring it within section 29 (1) of the Act. In the view which I take it will be sufficient to consider whether any such order must necessarily be made "without any reasonable or probable cause", for, if it need not be so made, it will be outside the sub-section, and it will be unnecessary to consider whether in any other respects it need not fall within the terms of the sub-section.

As has been fully stated by my noble and learned friends, it is now settled that the use of the stop list by an association in good faith and in furtherance or protection of its legitimate trade interests is legal: WARE & DE FREVILLE *v.* MOTOR TRADE ASSOCIATION ([1921] 3 K. B. 40) approved of in SORRELL *v.* SMITH ([1925] A. C. 700). In the present case there can be no doubt that the offer to receive payment of a fine as an alternative to the exercise of that right is intended to be more favourable to the offending person, and that the cause of the offer is the existing right of the association to place such person on the stop list. In my opinion that existing right, in the absence of special circumstances, affords reasonable and probable cause for the alternative offered.

I therefore agree that the decision of the Court of Appeal in HARDIE & LANE, LTD. *v.* CHILTON (*supra*) was correct, and that the decision in DENYER (*supra*), so far as in principle it conflicts therewith, is incorrect. The facts in the

latter case are not sufficiently disclosed in the report to enable me to discuss the correctness of the decision in that particular case, even if it were necessary to do so.

For these reasons I agree that the appeal should be dismissed.

LORD RUSSELL OF KILLOWEN: My Lords, the question for our decision is whether so much of rule 15 (1) as gives power to the council or price protection committees to order that the name of a member or any other person be placed on the stop list unless within twenty-one days he pay to the association a fine within limits to be laid down by the council and give such undertaking as the council or price protection committees may demand is illegal; the ground for the alleged illegality being that an exercise of that power must necessarily involve the commission of the felony described in section 29 (1) (i) of the Larceny Act, 1916.

That particular felony is thus described: "Every person who utters, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without reasonable or probable cause, any property or valuable thing . . . shall be guilty of felony, and on conviction thereof liable to penal servitude for life, . . ."

The power of putting names, whether of members or non-members, on the stop list, if exercised *bona fide* for the promotion of the trade interests of members, was held to be lawful by the Court of Appeal in WARE & DE FREVILLE, LTD. *v.* MOTOR TRADE ASSOCIATION ([1921] 3 K. B. 40), a decision subsequently approved by your Lordships' House in SORRELL *v.* SMITH ([1925] A. C. 700). But requesting the payment of a fine as part of an offered alternative to inclusion in the stop list is a different matter, and the question whether sending a letter containing such a request is an offence within the before-mentioned provision of the Larceny Act, 1916, is one on which an acute difference of opinion arose between the Court of Criminal Appeal in

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DENYER (19 Cr. App. R. 93; [1926] 2 K. B. 258) and the Court of Appeal in HARDIE & LANE, LTD. *v.* CHILTON ([1928] 2 K. B. 306). There can be no doubt as to the conflict between these two decisions, which no ingenuity can reconcile. It is for us to say which was right in law.

For myself I feel no doubt. Though like others of your Lordships I think that some of the propositions of Scrutton, L.J., are too widely stated and might cover and protect an undoubted blackmailer, I am of opinion that the decision in HARDIE & LANE, LTD. *v.* CHILTON (*supra*) was correct; and that Denyer's appeal should have been allowed. I will assume that Denyer's letter, and the letter in HARDIE & LANE, LTD. *v.* CHILTON (*supra*), can rightly be said to be letters "demanding . . . with menaces", though I confess that in view of the fact that the payment of money is only one part of an alternative, the end and object of which is protection of trade interest, I feel a doubt whether such letters can properly be brought within the terms of a provision which is undoubtedly aimed at blackmailers. But in order that the offence described in section 29 (1) (i) of the Larceny Act, 1916, may be established, the jury must be satisfied not only that the accused had uttered a letter or writing demanding of a person with menaces some property or valuable thing, but also that the demand had been made without any reasonable or probable cause. They would have to be satisfied that there was an absence of any reasonable or probable cause.

It is on this point that I think that the decision in DENYER (*supra*) erred. The extract from the summing up of Talbot, J., which is set out in the judgment (19 Cr. App. R., at p. 100; [1926] 2 K. B., at p. 269) and which was accepted as a proper direction to the jury, shows that the jury were told in broad terms—"a person has no right to demand money, according to the Act of Parliament, as a price of abstaining from inflicting unpleasant consequences upon a man". That proposition seems to me far too wide, and

so stated it is in effect a direction that no reasonable or probable cause for Denyer's demand existed.

I am in agreement with the views expressed by Romer, J., in the judgment which he delivered in HARDIE & LANE, LTD. *v.* CHILTON (*supra*), in the course of which he said (at p. 335): "For it is sufficient for the defendants, if they had reasonable cause for making the demand. That they had I can feel no doubt. Having it in their power to place the plaintiffs on the stop list, but being desirous of taking a more lenient course, they gave the plaintiffs the option of paying a fine. I am wholly unable to understand how it can be suggested that this was not an eminently reasonable thing to do. The question of reasonable or probable cause appears to be one for the jury, but only of course where there is some evidence of its absence. In the present case there is, in my opinion, none."

My Lords, so long as the payment of money demanded in the letter is demanded as part of or in furtherance of the association's object of promoting trade interests, there cannot, in my opinion, be an absence of reasonable or probable cause for the demand. The writer of the letter cannot therefore be convicted under the provision of the Larceny Act, 1916, which is here in question. For these reasons I would dismiss this appeal.

LORD WRIGHT: My Lords, the appellant (I may disregard the fact that the original plaintiff has died and been replaced by his executrix) was at all material times a member of the respondent association. In these proceedings the Court is asked to make declarations whether certain rules of the respondent association are or are not valid. Whether a declaratory judgment should be made is in any case a matter of the Court's discretion. There is here a further complication in that the action is what is called a friendly action. I have had some doubts whether this action is one in which declaratory relief should be granted. The

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questions, however, are not merely abstract, but are of practical importance to persons in the position of the appellant, and on the whole I think that this House should not refuse to entertain the appeal.

What is in issue is the validity of rule 15 (1) of the respondent association, which is attacked as necessarily contravening a provision of the criminal law, contained in section 29 (1) of the Larceny Act, 1916. The ground of attack has been limited to that section. The action is justified because of the conflict between a decision of the Court of Criminal Appeal in DENYER (19 Cr. App. R. 93; [1926] 2 K. B. 258) in a criminal case and a decision of the Court of Appeal in HARDIE & LANE, LTD. *v.* CHILTON ([1928] 2 K. B. 306) in a civil action. The later decision was followed by the trial Judge and the Court of Appeal, without any independent judgments being given. It will be necessary to consider the latter decision as embodying the judgments appealed from.

The facts and the relevant rules of the respondent association have been fully placed before your Lordships, and I shall content myself with the barest summary. The object, so far as is here material, of the respondent association, is generally to promote and protect the interests of its members, *inter alia*, by preventing cutting or inflating the prices fixed for their goods by manufacturers or sole concessionaire members. This is described as the policy of price protection. In pursuance of that policy the rules of the respondent association provide that members shall sell such goods at the prices so fixed, neither higher nor lower, and, further, that members shall not sell such goods to any person, whether member or not, who sells such goods at other than the fixed prices or sell to any person who supplies to another who sells them at other than the fixed prices. To carry out these purposes, a list called the stop list is prepared containing the names of those who, having acted contrary to the price-maintenance provisions, have

come within the scope of the prohibition. This list is also circulated in the motor trade journals, so that all persons in the trade, whether members of the respondent association or not, may know to whom such goods are not to be supplied.

That the stop list is not unlawful in itself was not contested, at least if prepared and published in good faith. Each member of the respondent association is free in law either to supply or not to supply his goods to any particular individuals. Hence he may lawfully exercise his freedom of choice by deciding not to supply his goods to any person named in the stop list. An agreement or combination of the members or of the respondent association and the members not to supply the goods to persons whose names appear in the stop list is also lawful, provided that the intent of the combination is to promote and protect the legitimate trade interests of the respondent association and its members and is not a combination wilfully to injure. I take the law on this point as stated by Lord Dunedin in SORRELL *v.* SMITH ([1925] A. C. 700, at p. 724), that "in an action against a set of persons in combination, a conspiracy to injure, followed by actual injury, will give a good cause for action, and motive or intent when the act itself is not illegal is of the essence of the conspiracy". Lord Dunedin stated this as being the result of QUINN *v.* LEATHEM ([1901] A. C. 495), after an examination of that case, of MOGUL STEAMSHIP CO., LTD. *v.* MCGREGOR, GOW & CO. ([1892] A. C. 25) and of ALLEN *v.* FLOOD ([1898] A. C. 1). The opinions of the other members of the House were in substance the same.

Indeed the lawfulness of the stop list of the respondent association was expressly considered by the House of Lords in SORRELL *v.* SMITH (*supra*), in which the House approved the decision of the Court of Appeal in WARE & DE FREVILLE, LTD. *v.* MOTOR TRADE ASSOCIATION ([1921] 3 K. B. 40), where it was held that the publication in the stop list of the

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name of the plaintiff, who was not a member of the defendant association, was done by the defendants *bona fide* in the protection of the trade interests of the members of the association and was therefore not unlawful. In that case, as in SORRELL *v.* SMITH (*supra*), the essential features were the absence of an intent on the part of the defendants to injure, and the presence of the purpose of the defendants to promote their legitimate trade interests. On these grounds QUINN *v.* LEATHEM (*supra*) was distinguished as being a case where there was a deliberate intention to injure. On the other hand, MOGUL STEAMSHIP CO., LTD. *v.* MCGREGOR, GOW & CO. (*supra*) was a case where what the combination did was held to be done in the way of commercial competition. The defendant shipowners had combined to obtain a monopoly of the tea trade from China by offering a discount to customers who only shipped by their vessels, by underbidding the plaintiff when he put a vessel on the berth, and by taking away their agency from persons who acted as shipping agents for the plaintiffs. All these matters were necessarily injurious to the plaintiffs, but injury to them was not the essence of the combination, which was that the defendants should obtain control of the trade in the way of legitimate competition for their own benefit. There were no unlawful means employed. The defendants were lawfully entitled to offer such terms as they thought fit to secure business, even though the result was to take business from the plaintiffs. The decisive question was (to quote Lord Dunedin's words in SORRELL *v.* SMITH [1925] A. C., at p. 730) to ask "a jury or a Judge whether there was a conspiracy to injure or only a set of acts dictated by business interests". MOGUL STEAMSHIP CO., LTD. *v.* MCGREGOR, GOW & CO. (*supra*) was the leading case for the doctrine that the right of every person to be free to trade or employ his services as he will is subject to and conditioned by the similar right in every other person. When a person is placed on the stop list, the traders who refuse to supply

him are exercising their freedom to trade as they will, just as much as the person who exercises his freedom to sell at other than the fixed prices and at any price that suits him. The traders who refuse to supply him are free to combine for this purpose so long as they do so within the conditions just stated. In these circumstances the detriment suffered by the trader (if neither the combination nor the means employed are unlawful) gives him no cause of action.

I have analysed very summarily the reason why the stop list has been held to be *prima facie* lawful, that is to say, that a plaintiff can only complain of it if he can show special grounds why it should be held to be unlawful. But it is necessary to pass to the real question in this case—namely, whether so much of the rule is invalid as goes on to authorise the respondent association to offer to a person, whose name after due inquiry it has been found proper to place on the stop list, the option instead of that being done of paying a sum of money called a fine or penalty, of which under the rules notice must be communicated in writing. An undertaking may also be exacted. Does the sending of such a communication in writing constitute (1) a letter or writing, (2) demanding with menaces and (3) without any reasonable or probable cause, (4) any property or valuable thing within section 29 (1) of the Larceny Act, 1916?

Before I consider the two directly relevant authorities I shall state briefly how I construe the sub-section. In such a case as that assumed there is, within the terms of the sub-section, a letter or writing. There must be in it a demand for money, which is property or a valuable thing. I think that the word "menace" is to be liberally construed and not as limited to threats of violence, but as including threats of any action detrimental to or unpleasant to the person addressed. It may also include a warning that in certain events such action is intended. Thus it might ordinarily include such a threat as the threat to place on

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the stop list, which for a motor trader has serious consequences.

The crucial question is whether there is an absence of reasonable or probable cause. I find it difficult to give a precise meaning to "probable", as distinguished from "reasonable", and I shall assume that it adds nothing beyond what is meant by "reasonable". The question, then, is whether there is reasonable cause for the demand. A demand to satisfy the sub-section must be not merely with menaces but with an absence of reasonable cause. Is the liberty in law which the respondent association possesses to put a trader's name on the stop list capable in law of constituting a reasonable cause for demanding the money? I have stated the question in this form because I now feel that I must observe on a peculiar difficulty in answering the questions put in the statement of claim. The effect of section 29 (1) can only arise for decision in a concrete case. The facts would in that event be before the jury, who would, as I think, in general be asked to find a verdict of guilty or not guilty. For that purpose they would have to decide, after being duly directed in law, if there was a demand in writing, if it was with menaces, if it was without reasonable or probable cause. The last direction would in my opinion need to be carefully explained. I think that the jury should be directed by the Judge that the respondent association had a legal right to put the person's name on the stop list so long as they did so to promote the trade interests of the association and its members and not with intent to injure, and so long as the money, fine or penalty demanded was reasonable and not extortionate. In other words, the jury would have to answer the question suggested by Lord Dunedin in SORRELL *v.* SMITH (*supra*) "whether there was a conspiracy to injure or only a set of acts dictated by business interests". The question of reasonable cause would have to be applied to the amount of the penalty or fine as well as to the menace of inserting in the stop list. If the

amount demanded is beyond reason in all the circumstances, there could not be a reasonable cause for demanding that amount regarded merely from the aspect of *quantum*. There must be a reasonable cause for demanding the particular amount.

When the problem is looked at in this way it follows that a categorical declaration that the rule is valid cannot be made unless the rule is construed as limited to what is reasonable. Otherwise the apparatus under the rule might obviously be used oppressively and for purposes of injury and extortion. But for purposes of this action I think that it should be assumed that the rule and the powers under it are implicitly controlled by what is reasonable, and that the rule must be so construed. I proceed on that assumption. In the absence of evidence from which an actual intention to injure can be established or inferred, I think that the mere fact that a person has been notified by a demand in writing that his name will be placed on the stop list unless he pays a fine and gives an undertaking in the words of rule 15 (1) would not, as a rule, show a case proper to go to the jury that an offence had been committed under section 29 (1) of the Larceny Act. The prosecution would be required to establish that there was an absence of reasonable cause in the full sense, that what was done was not done in the promotion of the legitimate trade interests of the association and its members, that there was an intent to injure and that the money demanded as an alternative to the name being put on the stop list was extortionate or excessive. The onus is throughout on the prosecution to establish all the elements of the offence. If it appeared on the evidence for the prosecution that, though there was a demand in writing with menaces, yet there was reasonable cause in the sense which I have explained, the case should be withdrawn from the jury. If, however, there was evidence of the absence of reasonable or probable cause, then the jury must decide after hearing the whole case.

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In DENYER (*supra*) the Court of Criminal Appeal upheld a conviction under section 29 (1) of the Larceny Act against the superintendent of the respondent association's stop list. A motor dealer named Read, not a member of the association, had offered to sell a car at a certain price named by him, and had sold a tyre. An inquiry was held by the council of the association, at which Read appeared. A letter was then sent by the defendant on behalf of the association offering to Read the option of paying £250 and £7 as the alternative to his name being included in the stop list. The jury convicted under section 29 (1). On appeal the conviction was upheld. Lord Hewart, C.J., said (19 Cr. App. R., at p. 99; [1926] 2 K. B., at p. 268): "In the opinion of this Court there was not merely some, but ample and overwhelming material for the consideration of the jury in this case. It has been said again and again that, because this trade protection association had the legal right to put the name of Mr. Read upon the stop list, it therefore had a legal right to demand money from him as the price of abstaining from putting his name upon the stop list. In the opinion of the Court, that proposition is not merely untrue; it is precisely the reverse of the truth. It is an excuse which might be offered by blackmailers to an indefinite extent. There is not the remotest nexus or relationship between a right to put the name of Mr. Read upon the stop list and a right to demand from him £257 as the price of abstaining from that course." I cannot with great respect accept this as a correct or sufficient statement of the law. I do not know the facts of the case except so far as they appear in the report. But I cannot find in the facts as reported any evidence of the offence charged proper to go to the jury. It does not appear that the complaint was directed to the amount demanded being extortionate. The objection taken was that any money at all was demanded. I need not repeat that it may be quite legitimate, for the reasons which I have stated above, to give the

trader the option of paying a reasonable sum of money as an alternative to the association's taking, as under proper circumstances they lawfully might, the much more damaging course of putting the trader's name on the stop list. The matter may thus resolve itself into a mere question for the trader to decide which alternative is for him commercially more expedient. As I shall explain later, when I discuss the judgment of the Court of Appeal in HARDIE & LANE, LTD. *v.* CHILTON (*supra*), there may be blackmail where a man is threatening to do something which he is at liberty lawfully to do. But the fact that the stop list is in proper cases legitimate will constitute in such cases reasonable cause for a reasonable demand. On the other hand, the stop list cannot be lawfully used as an instrument of extortion and oppression. Later in his judgment Lord Hewart, C.J., quoted part of the summing up of the trial Judge. I shall only repeat one short passage (19 Cr. App. R., at p. 100; [1926] 2 K. B., at p. 269): "A person has no right to demand money . . . as the price of abstaining from inflicting unpleasant consequences upon a man." It is always difficult to criticise a short passage in a summing up, but the general proposition as stated cannot, I respectfully think, be justified and constituted a material misdirection. There are many possible circumstances under which a man may say to another that he will abstain from conduct unpleasant to the other only if he is paid a sum of money. Thus he may offer not to build on his plot of land if he is compensated for abstaining. He is entitled to bargain as a consideration for agreeing not to use his own land as he lawfully may, and the other man may think it worth while to pay him rather than have the amenities of his house destroyed by an eyesore. Or a valued servant may threaten to go to other employment unless he is paid a bonus or increased wages. Or a man may offer to abstain from prosecuting for a common assault or infringement of his trade mark if he is paid compensation for the civil wrong

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or if the other man makes a public apology, as in FISHER *v.* APOLLINARIS CO. (L. R. 10 Ch. 297). Many similar instances may be given.

As I read the report, I am bound to say, with respect, that the decision in DENYER (*supra*) was in my opinion wrong. I cannot accept the propositions of law which I have just quoted as accurate statements of the general law or as a proper direction to a jury.

I turn to HARDIE & LANE, LTD. *v.* CHILTON (*supra*). That was a civil action. The plaintiffs were members of the Motor Trade Association, and had been offered under the rules, as an alternative to being placed on the stop list, the option of paying £200 in addition to buying back the car which had been sold below the list price and giving an undertaking. They agreed, and paid £100 on account of the £200. Later, becoming aware of the decision in DENYER (*supra*), they issued a writ claiming repayment of what they had paid. The jury, having been directed by Avory, J., that to obtain money, to which there was no legal claim, by threats calculated to deprive a man of his voluntary power of action was illegal, whether done by two or more persons in agreement or by one person only, found a verdict for the plaintiffs. The Court of Appeal set the verdict aside and entered judgment for the defendants, holding that the case should have been withdrawn from the jury. Romer, L.J., thus summed up his opinion (at p. 335): "It is sufficient for the defendants, if they had reasonable cause for making the demand. That they had I can feel no doubt. Having it in their power to place the plaintiffs on the stop list, but being desirous of taking a more lenient course, they gave the plaintiffs the option of paying a fine. I am wholly unable to understand how it can be suggested that this was not an eminently reasonable thing to do." On these assumptions of fact I completely agree. I think that the case was rightly decided. There are, however, in the judgments of the Court of Appeal various observations, not

necessary for the decision, on section 29 (1) of the Larceny Act, 1916, which I do not think can be fully supported. Thus Scrutton, L.J., said (at p. 322): "If there is no evidence on which a jury could find lack of reasonable and probable cause, in that the act threatened is all which the defendant had a right to do, the Judge should withdraw the case from the jury, and . . . such a case is where the threatener has a legal right to do what he threatens." If by "right to do" it is intended to refer to a right of a man to use his property as he desires or to give or withhold his services without any breach of contract as he desires, or to abstain from legitimate competition, the proposition seems to me to be correct.

I may add to the instances I have given above such a case as that of the owner of multiple stores offering not to open a shop in a particular locality if a tradesman or tradesmen in the locality will compensate him for so doing. But there are many cases where a man who has a "right", in the sense of a liberty or capacity to an act which is not unlawful, but which is liable seriously to injure another, will be liable to a charge of blackmail if he demands money from that other as the price of abstaining. Such instances indeed are very typical cases of blackmail, either under sections 29, 30 or 31 of the Act. Thus a man may be possessed of knowledge of discreditable incidents in the victim's life and may seek to extort money by threatening, if he is not paid, to disclose the knowledge to a wife or husband or employer, though the disclosure may not be libellous. Such is a common type of blackmail. Cases where the non-disclosure to the proper authority is illegal as amounting to compounding a felony or a misdemeanour of public import, or where the publication would constitute a criminal libel, are *a fortiori*. Again, a legal liberty (that is, something that a man may do with legal justification) may form the basis of blackmail. Thus a husband, who has proof of his wife's adultery, may threaten the paramour that he will petition in the Divorce

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Court unless he is bought off. Though it is possible that the facts of such a case might show merely the legitimate compromise of a claim to damages, on the other hand, the facts might be such as to constitute extortion and blackmail of a serious type.

I cannot assent to the proposition that section 29 (1) is sufficiently excluded once it is shown that the act threatened is not a legal wrong in itself, that is, something which the person threatening may either do or not do without a breach of the law, something which may better perhaps be described as a legal liberty than a legal right. I may add that I do not find in section 29 (4) a comprehensive definition of menaces or threats, but merely an explanation in view of certain provisions of the earlier sub-sections.

The two declarations asked for distinguish the cases of a member and of a non-member of the respondent association. There are no doubt certain differences between these cases, because a member has agreed to be subject to the rules, whereas a non-member has not. But even a member cannot legally consent in advance to be the victim of an offence under section 29 (1). If, however, the rule is construed as limited to what is reasonable, as in my opinion it should be, I think that the declarations claimed should properly be made.

LORD ROCHE: My Lords, I also am of opinion that this appeal should be dismissed. Your Lordships who have already given your opinions have dealt with the facts of the case and the authorities bearing on the matters under discussion so fully, and in a sense so completely meeting with my concurrence, that I can state shortly the steps which lead me to the conclusion which I have expressed.

This action and appeal can only succeed if the exercise by the respondents of the powers they assume under the rules to require payment of money in lieu of placing a name on the stop list must involve an illegality—namely, an

offence under section 29 of the Larceny Act, 1916. If the direction given by the trial Judge to the jury in DENYER (19 Cr. App. R. 93; [1926] 2 K. B. 258) and approved by the Court of Criminal Appeal is correct, then such an illegality is necessarily involved. The passage from the summing up of the learned trial Judge, quoted in opinions already delivered, amounts to a direction that the demand of any money at all is a demand made without reasonable or probable cause. This direction is, in my judgment, contrary to the principles implicit in the decision of this House in SORRELL *v.* SMITH ([1925] A. C. 700), approving WARE & DE FREVILLE, LTD. *v.* MOTOR TRADE ASSOCIATION ([1921] 3 K. B. 40). The reason why procedure by way of stop list was there held not to be unlawful was that, though it was taken by persons acting in combination, the intent of the procedure was the protection of the defendants' trade interests. But if the protection of trade interests from damage and injury could be lawfully effected by means of a stop list, though the stop list would damage the plaintiffs, the conclusion seems to be necessarily involved that, in lieu of procedure by stop list, money compensation might lawfully be asked and accepted in respect of the injury to the defendants' trade interests done by the plaintiffs. Money adjustments of business injuries are normal and lawful, and accordingly merely to ask for or to demand money as an alternative to the placing of a name on the stop list cannot, in my judgment, be properly said to be making a demand without reasonable or probable cause.

It will be observed that I have confined my observations on DENYER (*supra*) to the question of the direction to the jury and have stated my opinion that it is too broadly expressed and cannot be supported. It may be—I do not know enough of the facts to express an opinion—that there were facts in that case proper to be left to the jury with another direction on which the jury would have been entitled to convict. I agree entirely with my noble and learned

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friend Lord Wright in his views as to the proper directions to and questions for a jury, and in particular I agree that if a sum is demanded in the manner struck at by the statute there must be reasonable and probable cause for demanding that very sum. A demand of a sum extortionate in amount would, I think, clearly be evidence fit to be left to a jury in a civil case of an intent to injure as opposed to an intent to protect trade interests, and in a criminal case of the fact that the sum was demanded without reasonable or probable cause.

I also agree that in the judgments of the Court of Appeal in HARDIE & LANE, LTD. *v.* CHILTON ([1928] 2 K. B. 306) there are statements which, taken literally, do not accurately state the law in that they would seem to import that no demand of money in connection with a stop list could amount to an actionable wrong or to a crime. It would, in my opinion, be both erroneous and mischievous to give colour to the opinion that, because a demand of money in such a connection is not necessarily unlawful or a crime, it cannot in any circumstances be either the one or the other. At the same time I do not entertain any doubt that in HARDIE & LANE, LTD. *v.* CHILTON (*supra*) the correct conclusion was reached by the Court of Appeal. The plaintiffs were members of the association, consenting to, but breaking, its rules, and it was plain on their own evidence that they regarded the money demand as welcome because more merciful to them as offenders than appearance in the stop list. This is indeed a typical case where, had the proceedings been in the nature of a criminal prosecution under the Larceny Act, and had the same evidence been given for the prosecution as was given for the plaintiffs in the civil proceedings, the proper direction to the jury would have been that there was no evidence on which they could find an absence of reasonable or probable cause for the demand and that they ought to return a verdict of not guilty. That case, therefore, provides a clear example of how the rules

sought to be impeached in this action can be applied in practice without illegality. The case of a non-member of the association does not in my opinion differ from that of a member in any material respect, save that in the case of a member proof of the absence of reasonable and probable cause for demanding the sums fixed by the rules would obviously be more difficult, if not insuperable.

My Lords, these are my reasons for thinking that the appeal should be dismissed.

Appeal dismissed.

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Solicitors—Nicholson, Graham & Jones, for appellant; Michael Abrahams, Sons & Co., for respondents.

BEFORE

MR. JUSTICE TALBOT, MR. JUSTICE DU PARCQ AND MR. JUSTICE ATKINSON.

EDWARD NAYLOR.

Sentence—Borstal Detention—Report by or on behalf of Prison Commissioners—Reasons to be added where Recommendation against Borstal Detention made—Prevention of Crime Act, 1908 (8 *Edw.* 7, *c.* 58), *s.* 1 (1).

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Where a report made by or on behalf of the Prison Commissioners under section 1 (1) of the Prevention of Crime Act, 1908 (*a*), contains a recommendation that a young offender of the appropriate age is not suitable for Borstal detention, the reasons for such recommendation ought to be added.

(*a*) By the proviso to s. 1 (1) of the Prevention of Crime Act, 1908, a Court before which a young offender is convicted on indictment, before passing sentence of detention in a Borstal institution, "shall consider any report or representations which may be made to it by or on behalf of the Prison Commissioners as to the suitability of the case for treatment in a Borstal institution".

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EDWARD NAYLOR.

Talbot, J., du Parcq, J., Atkinson, J.

Application for leave to appeal against sentence.

The appellant pleaded guilty at Lincoln Assizes on February 6, 1937, to shopbreaking and larceny and was sentenced by Humphreys, J., to three years' detention in a Borstal Institution.

No counsel appeared on either side.

The facts of the case, in so far as they are material, appear fully from the judgment.

DU PARCQ, J.: This applicant, who is twenty-two years of age, pleaded guilty at Lincoln Assizes to breaking and entering a shop and stealing wireless sets. When the Judge came to consider the question of sentence, there was before him a report from the Prison Governor that the applicant was not fit for detention in a Borstal institution. It appeared, however, that the applicant was not only guilty of the offence of shopbreaking and stealing wireless sets, but also wished to admit and to have taken into consideration four outstanding charges. It appeared on investigation that the applicant was, as the Judge put it, one of a party of persons who went about stealing other people's motor cars, and it occurred to the Judge that he came within the words of section 1 (1) of the Prevention of Crime Act, 1908, as being a person who "by reason of his criminal habits or tendencies" should be subject to detention in a Borstal institution. It is, of course, quite clear that, although there may be no previous convictions against a young offender, the actual offence of which he is convicted, or that offence together with other offences in respect of which he admits his guilt, may be sufficient to bring him within the terms of the section. The Judge, accordingly, took the course of asking the Prison Governor what was the reason of his adverse recommendation. The Governor replied: "I have no record of previous criminal habits or tendencies. The police reported that there were no previous convictions." The Judge then said: "Now you know that there are four

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other cases against him, perhaps you have altered your mind?" and the Governor replied: "The man is mentally and physically fit, and if there are criminal tendencies he is fit for Borstal." The Judge added: "I think in future when you are reporting that a prisoner is not fit for Borstal, if he is physically and mentally fit, it will be well just to state the reason."

This Court hopes that the attention of those whose duty it is to make such reports will be drawn to what was said by Humphreys, J., in this case, which is repeated by this Court. It is for the Judge ultimately to decide whether the case is suitable for Borstal detention, but under the Act of 1908 he must consider any report made by or on behalf of the Prison Commissioners. It is important, when the report states that in the opinion of the person making it the case is not suitable for Borstal detention, that the reasons for that recommendation should be added, so that the Judge may be able to decide whether the reasons are good or bad and, if necessary, make further investigation. [His Lordship went on to say that in the opinion of the Court there were no grounds for interfering with the sentence passed on the applicant, and that the application must be refused.]

Application refused.

BEFORE

MR. JUSTICE BRANSON, MR. JUSTICE DU PARCQ AND MR. JUSTICE LEWIS.

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HAROLD ADDISON FOWLER.

Sentence—Motor Car Offences—Driving under Influence of Drink —Previous Convictions for Careless Driving Properly Regarded — Disqualification for Holding Driving Licence — Period Not to be Indefinite—Road Traffic Act, 1930 (20 & 21 *Geo. 5, c.* 43), *s.* 15 (1), (2).

On a conviction for driving a motor vehicle when under the influence of drink, contrary to section 15 (1) of the Road Traffic Act, 1930, previous convictions for careless driving may properly be regarded by the Court in passing sentence, as the offences are of a similar character.

The disqualification for holding a driving licence imposed under section 15 (2) of the Act on conviction under subsection 1 must not be for an indefinite period.

Appeal against sentence.

The appellant was convicted at Middlesex Quarter Sessions on February 12, 1937, of driving a motor vehicle when under the influence of drink, contrary to section 15 (1) of the Road Traffic Act, 1930 (*a*), and was sentenced by the

(*a*) By the Road Traffic Act, 1930, s. 15 (1): "Any person who when driving or attempting to drive, or when in charge of, a motor vehicle on a road or other public place is under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle, shall be liable . . . (b) on conviction on indictment to imprisonment for a term not exceeding six months or to a fine, or to both such imprisonment and fine."

By sub-s. 2: "A person convicted of an offence under this section shall, unless the court for special reasons thinks fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification, be disqualified for a period of twelve months from the date of the conviction for holding or obtaining a licence."

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HAROLD ADDISON FOWLER.

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Deputy-Chairman to six months' imprisonment in the second division and to disqualification for holding a driving licence for an indefinite period. The appellant had twice been previously convicted of careless driving, contrary to section 12 of the Act, and the Court had regard to those previous convictions in passing sentence.

Bernard Gillis, for the appellant:

The sentence of imprisonment was too severe. The previous convictions of the appellant for careless driving should not have influenced the Deputy-Chairman's mind in passing sentence, as they were convictions for a different class of offence. [He referred to BOUCHER (1909), 2 Cr. App. R. 177 and PARSONS (1911), 7 Cr. App. R. 76.] In any event, the maximum sentence should not have been imposed in this case. Secondly, the disqualification for holding a driving licence for an indefinite period was bad in law. Such an ambiguous and uncertain sentence is unknown to the law. Section 15 (2) of the Act of 1930 is plain in its language and requires that, on a conviction for driving under the influence of drink, if no special circumstances are shown, disqualification either for twelve months or for a longer period must be ordered. The effect of the Deputy-Chairman's order is to make an application under section 7 (3) of the Act essential if the appellant ever desires to hold a licence in future. This is not the purpose of section 7 (3) and was not the intention of the Act.

Maxwell Turner, for the respondent:

It was open to the Deputy-Chairman to order disqualification for life, but if he had done so, and the appellant had later returned to the Court with an application for removal of that disqualification under section 7 of the Act, as he is always entitled to do, that application would not have been likely to succeed. The Deputy-Chairman has, however, acted less harshly, and the appellant can now come back to the Court after a reasonable time and make his application

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with some hope of success, and if that application succeeds, the disqualification will then be removed. Although, therefore, the disqualification was not for a definite period of weeks, months, or years, it was for a determinable period, and the Deputy-Chairman was entitled to impose it.

Bernard Gillis replied.

LEWIS, J.: In this case the appellant, a motor driver, was convicted before the Deputy-Chairman at Middlesex Quarter Sessions of driving a motor vehicle when under the influence of drink to such an extent as to be incapable of having proper control of the vehicle. He was also charged with driving a motor vehicle in a manner dangerous to the public, but the jury acquitted him on that charge. He now appeals against the sentence passed on him, which was one of six months' imprisonment in the second division and disqualification for holding a driving licence for an indefinite period. The Court is asked to say that the sentence of imprisonment was too harsh and also that the disqualification for an indefinite period is contrary to law.

The appellant had been convicted on three previous occasions, twice for driving without due care and attention and once for failing to have proper control of his vehicle, the allegation on that occasion being that the brakes were not in proper working order. His counsel has asked the Court to say that the two previous convictions for driving without due care and attention ought not to have been regarded by the Deputy-Chairman, on the ground that they were for offences of an entirely different character from that for which the appellant was then being sentenced. The Court does not think that they were. The previous convictions were for driving a motor car without due care and attention. The offence of which he was convicted at Middlesex Quarter Sessions was that of driving a motor vehicle when under the influence of drink to such an extent as to be incapable of having proper control of that vehicle. It is not an offence

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to drive a vehicle when under the influence of drink unless the driver is incapable of having proper control of the vehicle, which means that he has put himself in the position of being unable to drive carefully. For these reasons the Court is of opinion that the earlier offences were offences of a character similar to that of which the appellant was convicted at the sessions and that the Deputy-Chairman was entitled to regard them in passing sentence. It is suggested that, even if that is so, the sentence of six months' imprisonment in the second division was too severe, and it is contended that that is the maximum sentence. The maximum sentence is six months' imprisonment, with power also to inflict a fine. The Deputy-Chairman did not inflict a fine. We do not think that there are any grounds for reducing the sentence of imprisonment.

With regard to the disqualification imposed on the appellant, it seems to be clear that what the Deputy-Chairman had in mind was that, for the safety of the public, the appellant ought not to be allowed to drive a motor vehicle again until he gave up his habits of drinking, and I have no doubt that the Deputy-Chairman intended to act in the interests of the appellant. The appellant's counsel has said that on the facts of the case the Deputy-Chairman could not have imposed disqualification for life, as that would have been too severe, and that, if he had done so, it would have been very difficult for the appellant within a reasonable time afterwards to come back to the Court and get the disqualification removed. The Deputy-Chairman may well have been of that opinion and may well have thought that, by dealing with the matter as he did, he was giving the appellant the very best possible chance of coming back to the Court soon and persuading it that he had given up his habits of drinking and was now fit to drive a car. The section under which he was convicted is section 15 of the Road Traffic Act, 1930. [His Lordship read subsections 1 and 2, and continued:] Subsection 2 does not seem to this Court to give a Court any

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power to disqualify a driver, who has been found guilty of an offence under sub-section 1, for an indefinite period, and there is no doubt that the sentence of disqualification passed on the appellant was for an indefinite period. In view of that difficulty we think that the order of the Court in this respect was wrong, and that in the circumstances of the case there should be substituted for the indefinite period of disqualification a period of five years. This means that after a time the appellant will be able to go to the Court of quarter sessions, and if he can satisfy that Court that he has given up his habits of drinking and is once more fit, from the point of view of the public, to take a motor vehicle on the road, he will be able to get a driving licence again.

The sentence will run from the date of conviction.

Sentence varied.

Solicitors.—Theodore Elman & Co., for the appellant; Solicitor for the Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE SINGLETON.

FREDERICK DARKE.

1937.
3 *May.*

Indictment—Plea of Guilty to First Two Counts and Not Guilty to Third Count—Prisoner Given into Charge of Jury on Third Count—Plea of Guilty on Earlier Counts Not to be Mentioned.

The applicant pleaded guilty to two counts of an indictment charging him with housebreaking and larceny. On a third count charging him with assault on a police officer in the execution of his duty he pleaded not guilty.

Held, the plea of Guilty on the first two counts should not have been mentioned when the applicant was given into the charge of the jury on the third count.

Application for leave to appeal against conviction and sentence.

The applicant pleaded guilty at Buckinghamshire Quarter Sessions on April 5, 1937, to housebreaking and larceny, and on the following day was convicted of assaulting a police officer whilst in the execution of his duty. He was sentenced by the Deputy-Chairman to consecutive terms of fourteen months' and six months' imprisonment, in each case with hard labour.

The applicant was charged together with another prisoner on an indictment containing three counts. To the first two, which charged both prisoners with housebreaking and larceny, both pleaded guilty, and to the third, which charged both with assaulting a police officer whilst in the execution of his duty, both pleaded not guilty. On the following day both were tried on the third count, and when they were given into the charge of the jury the Clerk of the

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Peace mentioned the first two counts and stated that to those counts both prisoners had pleaded guilty.

No counsel appeared on either side.

HUMPHREYS, J. [after stating that, in the opinion of the Court, there were no grounds for interfering with the conviction]: There is a matter to which the Court thinks it necessary to refer in the hope that it will not occur again. The two prisoners, having pleaded guilty to the first two counts of the indictment and not guilty to the third count, were given into the charge of the jury on the third count. The Clerk of the Peace, in giving them in charge, informed the jury, who may not have been present when the pleas were taken on the previous day, that the two prisoners were charged on an indictment containing three counts, to two of which they had pleaded guilty. That course was quite irregular. The prisoners were entitled to be tried by the jury on a charge to which they had pleaded not guilty without any reference being made to the fact that they had pleaded guilty to other counts. That irregularity might in some cases have caused a serious difficulty to arise with regard to the conviction which followed. In this case it is clear that no miscarriage of justice can possibly have occurred, because the applicant at the beginning of his evidence himself informed the jury that he had committed the offences for which he was being arrested by the police officer. [His Lordship went on to say that, in the opinion of the Court, there were no grounds for interfering with the sentence.]

Application refused.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE DU PARCQ.

HARRY RULE.

1937.
26 & 27 *April.*
7 *May.*

Defamatory Libel—Qualified Privilege—Common Interest—Constituent and Member of Parliament—Allegation of Improper Conduct on Part of Public Official in Constituency—Desire to Obtain Member's Assistance in Bringing Complaint to Notice of Appropriate Minister.

The appellant, who was a Parliamentary elector in the Borough of Southampton, had communicated with one of the Members of Parliament for that constituency with the object of obtaining his aid in bringing certain matters to the attention of the Home Secretary, with whom the appellant desired an interview, and had offered to produce to the Member certain documents. The Member replied inviting the appellant to send him the documents and a statement of his case. In response to that letter, the appellant wrote two letters containing grave reflections on a member of the borough police force and a justice of the peace for the borough. On a charge against the appellant of publishing defamatory libels,

Held, the Member of Parliament had a sufficient interest in the subject-matter of the appellant's complaints to render the occasion of the publication of the alleged defamatory libels one of qualified privilege.

HARRISON *v.* BUSH (1855), 5 E. & B. 344, applied.

Appeal against conviction.

The appellant was convicted at Hampshire Assizes on March 8, 1937, on two counts of an indictment charging him with the publishing of defamatory libels and was ordered by Branson, J., to be bound over for twelve months in his own recognisances and to pay the costs of the prosecution.

The appellant was a Parliamentary elector for the Borough of Southampton, and in July, 1936, had been in

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communication with Mr. Craven Ellis, one of the Members of Parliament for that constituency, with the object of obtaining his aid in bringing certain matters, which at first the appellant did not specify, to the attention of one of His Majesty's Ministers. On July 7 the appellant wrote a letter intimating that the matters vitally affected the happiness of two of the Member's constituents, and that he desired to interview the Secretary of State for Home Affairs. At the same time he offered to produce to the Member certain documents in his possession. The Member replied asking the appellant to send him the documents together with a statement of his case. In response to that letter the appellant wrote two letters, which contained grave reflections on a member of the borough police force and on a justice of the peace for the borough. Those allegations gave rise to the charges of defamatory libel.

At the trial the defence was put forward that the alleged libels were published on a privileged occasion, but the Judge ruled that the occasion was not privileged, and, no other defence being raised, the jury found the appellant guilty on both counts.

J. Scott Henderson, for the appellant:

The ground of appeal is that the defence of privilege which the appellant raised at the trial should have been upheld by the Judge and the issue of malice left to the jury. The Judge ruled that the occasion on which the appellant wrote the letters containing the alleged libels was not privileged. A communication made by a constituent to his Member of Parliament in his capacity as Member is made on a privileged occasion. From a constitutional aspect, a subject has the right of approach to the Crown and Parliament, but anyone who desires to petition Parliament must lay his grievance before an individual Member. Further, a Member of Parliament has a duty to put forward the grievances of his constituents. [He referred to LAKE *v.* KING

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(1667-70) 1 Saund. 131 and ASHBY *v.* WHITE (1701), 14 St. Tr. 783.] The privilege in the present case may be based both on the ground of duty and also on the ground of the common interest existing between the appellant and the Member of Parliament. Any person has an interest to bring to the notice of the public authorities the misconduct of a public officer, and a Member of Parliament has an interest to receive from an elector communications relating to any matter which may properly be laid before Parliament. In the present case the Member had an additional interest because of the attitude which he himself had taken up. The appellant was seeking to obtain an interview with the Home Secretary and had told the member the general grounds on which he desired that interview, and the Member had then asked the appellant to submit his case in writing. The occasion would clearly have been privileged if the appellant had made the communication to the Home Secretary direct. [He referred to DICKSON *v.* WILTON (EARL) (1859) 1 F. & F. 419; WASON *v.* WALTER (1868) L. R. 4 Q. B. 73; JENOURE *v.* DELMEGE, [1891] A. C. 73; and HARRISON *v.* BUSH (1855), 5 E. & B. 344.] The position may be summed up by saying that every communication made by a constituent to his Member of Parliament, provided that it relates to a matter with which the Member as such could properly deal, is made on a privileged occasion.

F. J. Tucker, K.C. (*W. Blake Odgers*, with him), for the Crown:

The door would be thrown open very wide if the true test whether the occasion was privileged were whether the information given to the Member was such that he could in some way act upon it in his capacity as Member. If a complaint which ought to have been made to the Home Secretary might properly be made to any Member of Parliament, then the very careful consideration given in HARRISON *v.* BUSH (*supra*) to the question whether the complaint had been made to the proper authority would

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have been unnecessary. The mere relationship of elector and Member of Parliament does not ordinarily create a common interest or duty, though it may in certain circumstances. The test must be whether the duty or interest exists at the beginning, and the appellant cannot avail himself of the fact that in the present case the Member requested him to forward his complaint in writing. The mere fact that there has been a common practice to forward complaints to a particular quarter is not sufficient if that quarter is in fact not the proper quarter: HARWOOD *v.* GREEN (1828) 3 C. & P. 141. [He referred also to *Blackstone's Commentaries*, Bk. I, Ch. II, p. 159; CHAFFERS *v.* GOLDSMID, [1894] 1 Q. B. 186; GRAHAM *v.* CROZIER (1879), 44 Canada Q. B. Rep. 378; BLAGG *v.* STURT (1846), 10 Q. B. 899; HEBDITCH *v.* MACILWAINE, [1894] 2 Q. B. 54.] While it is conceded that a communication by the appellant to the Home Secretary on the matter in question would have been privileged, there is no authority for the proposition that a Member of Parliament has an interest in such a matter, nor does practice or convenience require that he should be converted into a channel of communication.

J. Scott Henderson replied.

Cur. adv. vult.

May 7.—The following considered judgment was read by

THE LORD CHIEF JUSTICE: This was an appeal heard before this Court a few days ago when du Parcq, J., who is not here this morning, was a member of the Court. The judgment I am about to read is the judgment of the whole Court.

The appellant was convicted before Branson, J., at the Assizes for the County of Southampton upon an indictment which charged him with publishing defamatory libels, knowing them to be false. There were two counts in the indictment. The first related to a libel concerning a

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detective-sergeant in the Southampton police force, published in letters addressed to Mr. William Craven Ellis, the second to a libel, published in one of these letters, concerning a justice of the peace for Southampton. There was no plea of justification. At the close of the case for the prosecution counsel for the Crown said that he would not ask the jury to find that the appellant knew the alleged libels to be false, and submitted that on the evidence the appellant should be convicted of publishing defamatory libels. Counsel for the appellant then submitted to the learned Judge that the letters were written on a privileged occasion, so that the appellant was entitled to be acquitted, unless the jury found that in writing them he was actuated by malice. After hearing argument, the learned Judge ruled that the occasion was not privileged. Thereupon counsel for the appellant announced that he would call no evidence and would not address the jury, inasmuch as all the evidence he had proposed to call was directed to show that the defendant had acted *bona fide* and without malice. The learned Judge directed the jury that they should convict the appellant if they were satisfied that he published the libels and that the words complained of were defamatory. The jury found the appellant guilty on both counts. The learned Judge ordered that he should be bound over in his own recognisances in the sum of £50 for twelve months to be of good behaviour and to come up for judgment if called upon, and that he should pay the costs of the prosecution.

The question for our determination is whether the learned Judge was right in holding upon the evidence before him that the occasion was not privileged. If that decision was correct, the verdict cannot be challenged; if it was erroneous, it follows that the conviction must be quashed.

The relevant facts are as follows: Mr. Craven Ellis is one of the Members of Parliament for Southampton. The

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appellant is an inhabitant and an elector of that county borough. Early in July, 1936, the appellant had been in communication with Mr. Craven Ellis, with the object of inducing him to help the appellant to bring certain matters, at first unspecified, to the attention of one of His Majesty's Ministers. On July 7 the appellant wrote to Mr. Craven Ellis a letter in which he said: "My business with either the Home Secretary or the Minister of Health is of the utmost urgency and importance which vitally affects two of your constituents' happiness." In the same letter the appellant offered to produce documents in his possession to Mr. Craven Ellis.

On the same date Mr. Craven Ellis acknowledged and replied to the appellant's letter. The terms of his reply are of importance. "Whilst I am most anxious," he wrote, "to do whatever I can to help my constituents who are in difficulties, it is quite impossible for me to ask the Secretary of State for Home Affairs to give an appointment unless I have first intimated to him what the purpose of the appointment is. You say that you are in possession of certain documents. These can be forwarded to me with utmost confidence, and if a full statement of the case accompanies the documents I can take steps to meet your wishes. . . . If you can let me have the statement and the documents by Thursday morning, it would then be possible to fix an appointment with the Minister early next week."

It was in response to this letter that the appellant, on July 8, wrote the two letters which are the subject of these proceedings. With one of them he enclosed a long statement signed by two persons which contained allegations of grave and indeed criminal misconduct against a detective-sergeant of the Southampton Police Force. The appellant took it upon himself to affirm his belief in these allegations, and, further, in a postscript to a second letter of July 8, alleged that a gentleman, whom he named and described as

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"Chairman of the Harbour Board", and who is also a justice of the peace, had been guilty of theft and other dishonest practices. "I can produce several living persons," he added, "as well as myself who can prove these awful statements to be absolute facts."

In the absence of any finding that the appellant was actuated by malice, we are bound to assume for the purposes of our judgment that, although these libels were wholly untrue, the appellant honestly believed them to be true and, in publishing them, was not influenced by any wrong or indirect motive. On this assumption, he was entitled to be acquitted if the communication which he made to Mr. Craven Ellis fell within the legal canon adopted by the Court of Queen's Bench in HARRISON *v.* BUSH (1855), 5 E. & B. 344, at p. 348: "A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter which, without this privilege, could be slanderous and actionable."

It was conceded in argument that the appellant had an interest in the subject-matter of the libels. Indeed the contrary could not well have been contended. In the circumstances of this case, as in those considered in HARRISON *v.* BUSH (*supra*), every elector and inhabitant of the locality would have an interest in the conduct of its public functionaries. (See *per* Lord Campbell, C.J., at pp. 348, 349.) The question remains whether Mr. Craven Ellis had a corresponding interest, and it was to this point that the argument before us was mainly directed. It was not disputed that the Secretary of State for Home Affairs was the Minister, or one of the Ministers, to whose attention it was proper to bring these complaints in the public interest.

The discussion has covered a wide field, but it will not

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be necessary for this Court to express any opinion as to the rights and duties generally of Members of Parliament. It is sufficient for the purpose of this case to say that in our judgment a Member of Parliament, to whom a written communication is addressed by one of his constituents asking for his assistance in bringing to the notice of the appropriate Minister a complaint of improper conduct in relation to his office on the part of some public official acting in that constituency, has sufficient interest in the subject-matter of the complaint to render the occasion of such publication a privileged occasion. When once it is seen that a decision favourable to the appellant requires no more than this limited assertion of the interest of a Member of Parliament in the welfare of his constituents, it appears to us impossible to resist the conclusion that the conviction cannot be supported.

In so holding we are doing no more than giving effect to well-settled principles. In the case of HEBDITCH *v.* MACILWAINE, [1894] 2 Q. B. 54, upon which reliance was placed by counsel for the Crown, it was not in dispute that the persons (a board of guardians) to whom the libel was published had no interest in the matter. (See *per* A. L. Smith, L.J., at p. 62.) The meaning of the word "interest" in this context is stated in a passage in the late Fraser, J.'s, book on the *Law of Libel and Slander*, where the learned author summarises the effect of many decisions. "This common interest may be in respect of very varied and different matters; indeed, the only limitation appears to be that it should be something legitimate and proper, something which the Courts will take cognisance of, and not merely an interest which is due to idle curiosity or a desire for gossip." (See *Fraser's Law of Libel and Slander*, 7th edition, at p. 152; in the 5th edition, at p. 229.)

It is in our view impossible to contend that the Member of Parliament had not at least such an interest in the

subject-matter of the libels as would come within this limitation.

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It follows in our judgment that the appeal must be allowed and the conviction quashed. The orders of the learned Judge consequent upon the conviction will be set aside.

Conviction quashed.

Solicitors—Lamport, Bassitt & Hiscock, Southampton, for appellant; Sharpe, Pritchard & Co., agents for the Town Clerk, Southampton, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE FINLAY AND MR. JUSTICE GODDARD.

PHILIP EDWARD PERCY DAVIS.

1937.
12 *July.*

Murder—Indictment—Joinder of Two Counts for Murder in one Indictment—Counts Tried Together—Course Undesirable but not Fatal to Conviction.

Where a prisoner is charged with the murder of more than one person, the proper course is to prefer a separate indictment in respect of each charge.

Where, however, a prisoner was tried on two counts of an indictment together, each of which charged him with the murder of a separate person, and no objection to that course was taken at the trial by his counsel :—

Held, the trial of the two counts together did not invalidate the conviction.

J. JONES, 13 Cr. App. R. 86; [1918] 2 K. B. 416, commented on.

Appeal against conviction.

The appellant was convicted on June 15, 1937, at Cornwall Assizes of the murder of his wife and niece, and was sentenced by Lawrence, J., to death.

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PHILIP EDWARD PERCY DAVIS

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The two charges of murder were contained in separate counts in one indictment, but at the trial counsel for the Crown offered to proceed on one charge only, or to prefer two separate indictments. Counsel for the defence was, however, content that the two charges should be tried together. The defence was one of insanity. It is unnecessary to set out the facts of the case.

J. Lhind Pratt (*Leslie Brooks* with him), for the appellant:

There appears to be no substance in the points taken by the appellant in his notice of appeal, and it is desired to raise two further points, which do not appear in the notice. The first is that the appellant ought not to have been tried on two charges of murder together. No objection to that course was taken at the trial, and the argument in this Court cannot, therefore, be based on any ground of prejudice. The contention must be that that course rendered the indictment bad in law. In J. JONES, 13 Cr. App. R. 86; [1918] 2 K. B. 416, it was held that the joinder of counts for murder and robbery with violence in one indictment was improper. The report is somewhat meagre, but it does not appear that the decision of the Court was based on any question of prejudice. The ground appears to have been that murder is so serious a charge that the trial of it should not be complicated by the inclusion of any other charge in the same indictment, and that principle would apply even more strongly where the additional charge was also one of murder. Secondly, the Judge commented on the fact that the appellant had not given evidence. He was, of course, entitled to do this, but, as the defence was one of insanity, he should have gone on to point out that, in view of that defence, there might be good reason for the appellant not giving evidence.

G. D. Roberts, K.C., and *L. R. Miller*, for the Crown, were not called on to argue.

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THE LORD CHIEF JUSTICE [after referring to the facts of the case and stating that in the opinion of the Court there was no substance in the points raised by the appellant in his notice of appeal]: The Court has permitted counsel for the appellant to take two other points. The first is that in the indictment there were two counts each of which charged the crime of murder. In other words, there were two distinct charges of murder relating to the death of two different persons.

It is admitted at the bar that at the trial counsel for the Crown offered either to proceed on one count only or to frame two indictments each of which should mention only one crime of wilful murder, but counsel for the appellant, in the exercise of his discretion, desired neither of those courses to be taken and dealt with the indictment as it was. Nevertheless he is minded, if possible, to-day, in spite of what was offered and done in the Court below, to take the point that there is a fundamental objection to an indictment for murder in which two murders are charged. It is certainly highly undesirable that in a case of murder more than one charge should be made in one indictment. On that point this Court has no doubt. The proper course in this case was to charge each murder separately in a separate indictment. It is, however, one thing to say that a certain course is undesirable and another thing to say that it goes to the root of the jurisdiction. It is quite manifest that the course taken in this case does not, for section 4 of the Indictments Act, 1915, contemplates in general terms the joinder of felonies in one indictment.

In J. JONES, 13 Cr. App. R. 86; [1918] 2 K. B. 416, where an indictment for murder contained also a count for robbery with violence, A. T. Lawrence, J., in giving the judgment of the Court, said (13 Cr. App. R., at p. 87; [1918] 2 K. B., at p. 417): "A trial for murder is too serious and complicated to have such counts inserted, and such was not the intention of the Indictments Act, 1915."

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In our opinion it is not accurate to say that the joinder of the two counts in this case was fatal, and indeed, when one looks at the facts of the two charges, it is apparent that together they may well be regarded as substantially one transaction. If there had been two separate indictments, it would have been easy and proper for the prosecution on the trial of one indictment only to tender evidence relating to the whole of the matter. None the less, I repeat that in the opinion of the Court the joinder of two murders in one indictment is undesirable. The matter is one for judicial discretion, and the fact that there were two counts in the indictment in the present case does not in the least invalidate the conviction.

Secondly, it was contended that the Judge erred in commenting on the fact that the appellant was not called to give evidence. There is nothing in that point. It is open to the Judge in a proper case to direct the attention of the jury to the fact that the prisoner has not gone into the witness box, and in directing the attention of the jury to that fact in the present case the Judge made no error.

The appeal must be dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE DU PARCQ.

WILLIAM ALFRED BOSELEY.

1937.
19 *October.*

Certificate that Case is Fit for Appeal—Not to be Granted merely because Counsel for Defence Presses for it—Fraudulent Conversion—Date on which Offence to be Charged.

Observations on the undesirability of the Judge at the trial granting a certificate under section 3 of the Criminal Appeal Act, 1907, that the case is one fit for appeal merely because counsel for the defence presses for one.

Observations on the question of the date which may be charged as the date of the offence in an indictment for fraudulent conversion.

Appeal against conviction (on certificate).

The appellant was convicted at Maidstone Borough Quarter Sessions on July 27, 1937, on three charges of fraudulent conversion and was sentenced by the Recorder to twelve months' imprisonment in the second division. The Recorder gave a certificate under section 3 (*b*) of the Criminal Appeal Act, 1907, that the case was one fit for appeal on the grounds "that counsel for the accused submitted to me that he desired to argue (a) whether I had correctly directed the jury on what constituted fraud in the circumstances; and (b) [this was not material]. In these circumstances, whilst I adhere to the direction I gave on the first point and consider the second point irrelevant, I thought it better, to obviate any possibility of injustice, to give leave to appeal against conviction".

The appellant commenced business as an estate agent at Maidstone on October 16, 1933. He had no capital, but

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his account at Martins Bank, Ltd., Maidstone, was guaranteed by an aunt for £250, which was increased in June, 1935, to £500. This was his only account, and acted as his business, domestic and private account. On December 3, 1936, a receiving order was made against him on a creditor's petition and he was adjudicated bankrupt on January 1, 1937.

The seventh count of the indictment referred to a sum of £80 paid by David Young Hill for the purpose of purchasing a house from Alphonse Nicholas Bernard. The money was paid as follows: £5 on October 10, 1936, and £115 on October 23, 1936, but from these two amounts £40 was deducted for other outgoings on behalf of the vendor. The count charged the appellant with having fraudulently converted to his own use £80 "received by him for and on account of Alphonse Nicholas Bernard". From the bank account it was impossible to ascertain on what day the alleged fraudulent conversions had actually taken place, as the appellant paid from the bank account all his social, domestic and business debts. It was decided, therefore, to charge the date of the receiving order, December 3, 1936, in each case. The reason for this procedure was that, at any time prior to that date, the appellant might have paid off any of his creditors by sacrificing any chances of the other creditors receiving a dividend. On the receiving order being made, however, the power to pay off any of the debts was taken away from the appellant, because the entire estate passed into the possession of the Official Receiver. December 3, 1936, was, therefore, the last date on which the fraudulent conversion could have taken place.

Eric V. E. White, for the appellant:

With regard to the seventh count, the date charged in the indictment was wrong. The moneys referred to in this count were paid after October 5, 1936. The appellant stated, in his preliminary examination in bankruptcy, that he

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realised he was insolvent on October 5, 1936. As the appellant was insolvent when he received the money, and as at that date he was a stakeholder and the purchase was not yet complete, he could not have been guilty of converting money received by him for and on account of Bernard, of which he was convicted. He could have been guilty only of converting money entrusted to him by Hill, and of that the jury found him not guilty. [He argued a number of other points, which are not material for the purpose of this report.]

Colin Pearson, for the Crown, was not called on to argue on this point.

HUMPHREYS, J.: This appellant was convicted at Maidstone Borough Sessions on three charges of fraudulent conversion and was sentenced to twelve months' imprisonment in the second division. A certificate was given by the Recorder enabling the appellant to appeal without applying for leave and necessitating the attendance of the prosecution on the hearing of the appeal. [His Lordship stated the grounds on which the certificate was granted as set out above, and continued:] It is desirable to repeat the observations of the Lord Chief Justice in LANGLEY AND OTHERS (1923), 17 Cr. App. R. 199, at p. 200: "It is clear that the learned Recorder was not of opinion that it was a case for a certificate, and he said that he only granted it because counsel asked for it. In view of his opinion and his ruling that there was evidence of larceny, which ruling this Court thinks was quite correct, it is a little puzzling to know why the certificate was granted. It is a departure from the ordinary practice, and if continued would result in a great increase of such cases, and considerable expense would be incurred, as in such cases the prosecution must be represented here, which would mean a great waste of public money." In a subsequent case (PARKIN (1928), 20 Cr. App. R. 173) another Court agreed with those

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observations and added that the mere fact that counsel asked and pressed for a certificate was no ground why a certificate should be granted.

In the present case it does not appear that any discussion took place at the trial on the question whether the Recorder had directed the jury properly or on what constituted fraud. There was some discussion whether he had properly directed the jury on what constitutes fraudulent conversion. This Court thinks it desirable to repeat the observations made in the cases which I have mentioned and to emphasise them. There was no question of any injustice, as the Recorder thought that there might be, because any person convicted is entitled to come to this Court and ask for leave to appeal and, if there is a real point of law, he is entitled to come before the full Court without any certificate at all.

In addition to the ground which appears on the certificate, Mr. White has said everything which could be said on behalf of his client. [His Lordship, after referring to the facts of the case and the arguments of counsel with respect to other counts on which the appellant was convicted, continued:] On the seventh count he was charged with fraudulently converting "to his own use and benefit certain property, that is to say, the sum of £80, received by him for and on account of Alphonse Nicholas Bernard". In that case Mr. Bernard was the vendor and Mr. Hill was the purchaser. Mr. White, who admits that the appellant was the stakeholder, has contended that there was a wrong date in the indictment. The indictment charges December 3, 1936, as the date of the fraudulent conversion. That is the date on which a receiving order was made on the appellant. The date is immaterial. The appellant received two sums, £5 on October 10, and a further £115 on October 23, 1936. At that time the appellant was hopelessly insolvent, and counsel has urged that if he fraudulently converted the money he did so on October 23. There is

nothing in that point. [His Lordship then proceeded to deal with other points in the appeal and stated that, in the opinion of the Court, there were no grounds for interfering with the conviction.]

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Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE DU PARCQ.

HENRY ISAAC ROTHFIELD.

8 *November.* 1937.

Indictment—Leave of Judge of High Court to Prefer—No Committal for Trial—Discretion of Judge not open to Review—Application for Leave not Accompanied by Bill of Indictment—Bill before Judge when Leave Granted—Administration of Justice (Miscellaneous Provisions) Act, 1933 (23 & 24 *Geo.* 5, *c.* 36), *s.* 2 (2)—*Indictments (Procedure) Rules*, 1933 (*St. R. & O.* 1933, *No.* 745), *r.* 5 (*a*).

Where a Judge of the High Court, under section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, has granted leave to prefer an indictment without the accused person being committed for trial, the Court of Criminal Appeal will not inquire into the exercise of the discretion conferred on that Judge by the Act, so long as it is clear that he had jurisdiction to entertain the application for leave.

Rule 5 (*a*) of the Indictments (Procedure) Rules, 1933, which provides that "every such application shall be accompanied by the bill of indictment which it is proposed to prefer" is sufficiently complied with if the bill of indictment which it is desired to prefer is before the Judge at the time when he deals with the application for leave.

Appeal against conviction.

The appellant was convicted on September 24, 1937, at the Central Criminal Court of obtaining money by false

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pretences and fraudulent conversion, and was sentenced by the Common Serjeant to four years' penal servitude.

The appellant was arrested on November 12, 1936. He appeared before an Alderman at the Mansion House Police Court on December 11. Evidence was taken on that day, and on December 18, 1936, and January 7, 14, 22 and 29, 1937. The next hearing was fixed for February 19, but as the Alderman was then ill, the hearing was adjourned until March 19. On that date it was found that the Alderman would not be able to resume the hearing at all. An application, under section 2 (2) (*b*) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, was made by the Director of Public Prosecutions to the Judge in Chambers for leave to prefer a bill of indictment without the accused person having been committed for trial. The bill of indictment did not accompany the application for leave, but was before Lewis, J., the Judge in Chambers, when he dealt with the application. On April 30, 1937, Lewis, J., gave leave to prefer the bill.

At the trial a motion to quash the indictment, on the ground that the requirements of the Act of 1933 and the rules made thereunder had not been complied with, was made on behalf of the appellant, but was refused by the Judge.

Maurice Healy, K.C. (*Bernard Gillis* with him):

The circumstances of the case were not sufficiently unusual to warrant the procedure adopted. There was an alternative procedure, which has been recognised as the one normally to be followed in such circumstances, namely, that of re-commencing the proceedings before another magistrate. A Judge cannot exercise his discretion in a matter of this kind unless he is fully informed of all the circumstances on which his discretion is to be exercised. He ought to be in possession, not only of all the facts of the case, but also of all the relevant decisions. Here the attention

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of Lewis, J., was never directed to BRAY (1862), 32 L. J. M. C. 11, and if that authority had been before him he might well have decided that this was not a case where he ought to give leave to prefer the bill of indictment.

G. D. Roberts, *K.C.*, and *Christmas Humphreys*, for the Crown, were not called on to argue.

HUMPHREYS, J.: Henry Isaac Rothfield was convicted at the Central Criminal Court upon an indictment which charged him with certain misdemeanours, including obtaining money by false pretences and fraudulent conversion, and he was sentenced to four years' penal servitude. He now appeals upon a point of law against that conviction. His notice of appeal states that the ground, and it is the only ground, of appeal is that the Judge—that is, the Common Serjeant, before whom the matter came—refused to quash the indictment, and that he was wrong in law in so doing. It is clear that there is no foundation at all for this appeal.

The Common Serjeant had before him an indictment, which, on the face of it, was a perfectly good indictment. It was indorsed by a Judge of the High Court, and the Common Serjeant also had before him an application which had been before the Judge of the High Court and which also had been indorsed by that Judge, showing that leave had been given to prefer the indictment. Upon those facts there was no ground at all upon which the Common Serjeant could have quashed the indictment. It was not for him to enter into an examination of the matters which had been before the Judge when he exercised the discretion imposed on him by statute and gave leave to prefer the indictment. Therefore, this appeal might be dealt with on the very short ground that the Common Serjeant was perfectly right in refusing to quash the indictment. But Mr. Maurice Healy, who appears for the appellant here, has invited the Court to go behind what happened at the Central Criminal Court,

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and to inquire into the question whether or not the Judge acted within his powers in granting leave to prefer the indictment as he did. Now, it cannot be made too plain, or stated too definitely, that this Court will not inquire into the exercise of the discretion of a Judge who is sitting and dealing with an application under the Administration of Justice (Miscellaneous Provisions) Act, 1933, so long as it is clear that he had jurisdiction to entertain the application.

The first ground on which Mr. Maurice Healy seeks to say that the indictment is bad is that the Judge wrongly exercised his discretion when he granted leave to prefer the bill of indictment. The wrongful exercise of his discretion appears to be this: that the rules made under the statute have not been complied with. Section 1 of the Act of 1933 provides for the abolishing of grand juries, perhaps only temporarily. Section 2 provides for the case of a person against whom it is desired to prefer an indictment, but who has not been committed for trial. Ever since the passing of the first of the Vexatious Indictments Acts, there were provisions for doing that, and obviously it was the intention of Parliament under the Act of 1933 to see that the circumstances in which the prosecution may prefer an indictment against a person who has not been committed for trial should be clearly defined, and that the law should be tightened in the interest of accused persons. An examination of the Vexatious Indictments Act, 1859, and the Administration of Justice (Miscellaneous Provisions) Act, 1933, will show that safeguards have been introduced into the latter Act. Section 2 (2) of the Act provides as follows: "... no bill of indictment charging any person with an indictable offence shall be preferred unless either: (*a*) the person charged has been committed for trial for the offence; or (*b*) the bill is preferred by the direction or with the consent of a Judge of the High Court. ..." Section 2 (6) provides that the Lord Chancellor may make rules for carrying this section into effect, and rules, in particular, "for making provision

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as to the manner in which and the time at which bills of indictment are to be preferred before any Court and the manner in which application is to be made for the consent of a Judge of the High Court or of a commissioner of assize for the preferment of a bill of indictment".

Under that provision, rules have been made, and Mr. Maurice Healy says that certain requirements under those rules have not been complied with. It must not be thought for a moment that this Court is laying down any rule of law that the mere failure to comply with any one of the rules will necessarily vitiate the discretion of a Judge in granting leave to prefer a bill of indictment. When one looks at this case, it will be seen that there is not even an irregularity. Rule 4 of the rules provides that every application shall be in writing, shall be signed by the applicant or his solicitor, and shall be either sent to the Judge or commissioner by post or delivered to his clerk. All those provisions were complied with here. The application, which was in fact by the Director of Public Prosecutions, should, according to rule 5 (*a*), have been accompanied by the bill of indictment, and Mr. Maurice Healy says that in this case the indictment did not accompany the application. That is perfectly true. But the application in this case states that the bill of indictment will be lodged in the Crown Office of the King's Bench Division of the High Court of Justice, and is not to be attached to the application. It is desirable to notice the way in which the application is made and determined. Under the Indictment (Procedure) Rules, 1933, r. 7: "Unless the judge or commissioner otherwise directs in any particular case, his decision on the application shall be signified in writing on the application without requiring the attendance before him of the applicant or of any of the witnesses, and if the judge or commissioner thinks fit to require the attendance of the applicant or of any of the witnesses, their attendance shall not be in open court." In our opinion, it is sufficient, and a compliance with the

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rule, if the indictment which it is desired to prefer is before the Judge at the time when he deals with the application which is being made to him. It is conceded by Mr. Maurice Healy that the Judge had the indictment, together with the application, before him when he gave his leave to prefer the indictment. There is nothing whatever in that point.

Mr. Maurice Healy has argued other matters which appear to go to the exercise of the discretion of the Judge. That is a matter into which this Court will not inquire, but, since it is desirable that it should be made plain that no injustice has been done in a criminal case in which a person has been convicted and sentenced, it is right to refer to the facts of the case, in order to show, not that the Judge has exercised his discretion properly, but that there is no possibility of injustice having arisen as a result of the exercise of that discretion.

The appellant was arrested on November 12, 1936. He was brought up at the Mansion House on December 11, and evidence was taken on that day and on December 18, 1936, and January 7, 14, 22, 29, 1937. The next hearing was fixed for February 19, and on that day the case was adjourned until March 19, because the Alderman was ill, as the result of an accident. On March 19, it was found that the Alderman would not be able to resume the hearing at all, and then there were two possible courses open. One was to bring back to the police court thirty witnesses who had already been called—some of whom came from remote parts of the country, six from Scotland and others from remote parts of England—and to go through their evidence, which had already been given, and with regard to which the appellant's advocate had either cross-examined, or had had the opportunity of cross-examining, if desired. That was one course. The other was not to call any more witnesses, but to ask the Judge in Chambers for leave to prefer a bill of indictment, in the terms of the statute passed for the purpose, on the evidence which had already been given plus a

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small portion of the evidence of one material witness—one who had been defrauded—and a number of other formal witnesses. The Judge, having those facts before him, exercised his discretion, a discretion into which this Court has no jurisdiction to inquire. In our view, that being the only point which has been argued as to the propriety of this conviction, there is no ground for quashing the conviction.

We have been referred to a number of cases, and Mr. Maurice Healy places some reliance on the judgment of Blackburn, J., in BRAY (1862), 32 L. J. M. C. 11, a case which was decided under the provisions of the Vexatious Indictments Act, 1859. Blackburn, J., there observed (at p. 12) that he was in the habit of refusing to make orders upon applications where the parties had not gone before a magistrate. That was on an application in which the only material before the Court was a newspaper cutting. Blackburn, J., continued that, where the parties had been before a magistrate, and depositions had been taken, and it afterwards turned out that there was a reason for preferring an indictment in a way provided for by the Act, and they then came before him, he was then in the habit of giving his consent, if he saw that a clear case had been made out. That case, so far from being a case which, if it had been brought to the attention of the Judge in Chambers in this case, would have been likely to cause him to refuse to exercise his discretion, would have only strengthened the application of the Director of Public Prosecutions. There is no ground for this appeal, and it is dismissed.

Appeal dismissed.

Solicitor—Emanuel Garber, for the appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE DU PARCQ.

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THOMAS LEWIS.

Summing-up—Corroboration—Evidence of Accomplice—Omission to Direct Jury—When Court will Uphold Conviction.

Where the presiding Judge at the trial has omitted to give any direction to the jury as to the danger of convicting the accused person on the uncorroborated evidence of accomplices, the conviction may be allowed to stand if, but only if, there exists corroborative evidence of such a convincing, cogent and irresistible character that the jury, if they had received the proper direction, must have come to the same conclusion.

Appeal against conviction.

The appellant was convicted at the County of London Sessions on October 1, 1937, of receiving stolen goods knowing them to have been stolen, and was sentenced by the Chairman to twelve months' imprisonment with hard labour.

The appellant was the proprietor of a grocer's shop, which he had kept for twenty-five years without complaint. Evidence was given that on a certain day when he was standing outside his shop a man named Sansun, who was walking past, got into conversation with him. Sansun said that his name was Jack and asked the appellant if he would buy some groceries. According to the evidence of Sansun, the appellant said that he would take anything. A few days later two men named Avery and Wassell came to the appellant's shop with a van and, after knocking at the door, brought in some butter and cheese, saying that the goods were from Jack. The appellant told them to put the goods down and they did so and drove off. Subsequently two

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police officers visited the appellant's shop and told the appellant that they had reason to believe that he had in his possession some stolen property. They asked if he bought any goods from G. T. Cox & Sons, who were Sansun's employers, or if he knew Sansun. He answered "No". They then told him that Sansun was in custody and asked him if he knew any of Cox & Sons' employees. He replied, "No". In the shop the police officers found a box, bearing a label "Cox & Sons", containing thirty-six packets of New Zealand butter, which the appellant said had come with nine other packets the night before, having been brought by a young man whom he did not know. They then asked him about some cheeses which were on the floor, and he said that he bought his cheeses from Messrs. Lovell & Christmas and produced accounts with that firm, which, however, contained no mention of cheese. Two of the cheeses in fact came from Messrs. G. T. Cox & Sons. When charged, the appellant made no reply, but afterwards said that he was waiting for Sansun to take the cheeses back as they were soapy. Before the appellant's trial, Sansun, Avery and Wassell pleaded guilty to stealing the goods from Messrs. G. T. Cox & Sons and were bound over. Sansun and Wassell then gave evidence for the prosecution at the trial of the appellant. In summing up to the jury, the Chairman omitted to warn them that it would be unsafe for them to convict the appellant on the evidence of accomplices without corroboration. The jury convicted the appellant.

Lord Reading, K.C. (*H. S. P. Moses* with him), for appellant:

The only point in this case was whether the appellant knew that the goods were stolen. Two of the witnesses for the prosecution were men who had pleaded guilty to stealing the goods, but the Chairman omitted to direct the jury that the evidence against the appellant was that of accomplices and gave them no warning not to convict on such evidence

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unless it was corroborated, nor did he explain to them what was meant in law by corroboration. The rule as to warning the jury with regard to the evidence of accomplices is of universal application and in the absence of such a warning the conviction cannot stand. [He was stopped.]

THE LORD CHIEF JUSTICE: There have been cases where this Court has held that, in spite of the general application of the rule that juries must be directed as to corroboration of the evidence of accomplices, the conviction could be supported, even in the absence of such a warning to the jury, on the ground that the evidence of corroboration was clear and convincing. We would like to hear counsel for the Crown on this point.

E. H. Butcher, for the Crown:

There was ample evidence against the appellant, apart from the evidence of the accomplices. The appellant's own statements to the police officers were consistent only with his guilt, and the cheeses which were the subject of the charge were distinctive, being different from all the other cheeses in his stock. There were also several statements in the evidence of the appellant himself which clearly corroborated the accomplices' evidence.

THE LORD CHIEF JUSTICE: This appellant was convicted at the London Sessions of receiving stolen goods knowing them to have been stolen and was sentenced to twelve months' imprisonment with hard labour. He now appeals against his conviction and applies for leave to appeal against his sentence. His grounds of appeal are (1) that the learned Chairman omitted to warn the jury of the danger of convicting on the evidence of accomplices; and (2) that there was no evidence corroborating the evidence of the accomplices.

One thing is clear and is common ground. There was no warning at all as to the evidence of accomplices. The rule

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is familiar. The practice of common law is for the Judge to warn the jury that it is unsafe to convict on the uncorroborated evidence of an accomplice and to advise them not to convict, though, at the same time, he may point out that it is within their legal province to convict if they think proper. Corroborative evidence must be evidence proceeding from a quarter independent of the accomplice and tending to implicate the accused and must corroborate the accomplice's evidence in a material particular. [His Lordship referred to the facts and evidence and continued.] The question for us now is whether in the circumstances of this case this conviction should stand. There have been many cases where convictions have been quashed because of the omission of a proper direction to the jury as to the danger of conviction on the evidence of accomplices. The rule as to giving that direction is, as counsel has said, a rule of universal application, but it by no means follows that failure to give such a direction is fatal to the conviction. The question for this Court is whether the proviso to section 4 (1) of the Criminal Appeal Act, 1907, should be applied to this case as being one where there has been no miscarriage of justice. This Court has held more than once that, although the Judge omits to give a proper direction, or any direction, nevertheless where corroborative evidence exists in the case and is of such a convincing, cogent and irresistible character that it is apparent that the jury, if they had had a proper direction, must inevitably have come to the same conclusion, the omission is not fatal; otherwise, it is. For example, in 1930 in W. C. DAVIES, 22 Cr. App. R. 33, at p. 35, I said: "The omission of an express direction on the position of accomplices is, undoubtedly, a matter for regret. One can only suppose that the Judge omitted it because he felt that, in view of the whole course of the trial, such a direction would be superfluous. The fact remains that the direction does not appear and the question for us is whether, in these circumstances, the verdict of guilty on the fifth count

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amounts to a substantial miscarriage of justice—or, in other words, whether it is clear that the jury would inevitably have arrived at the same conclusion upon that count, if an express direction on the lines laid down in BASKERVILLE, 12 Cr. App. R. 81; [1916] 2 K. B. 658, had been given." Then, after referring to the evidence, I said, "The Court is satisfied that, however explicit the direction on those lines had been, the jury could not have arrived at any conclusion other than that to which they came. There is no reason, therefore, for interfering with this conviction"

To apply that canon to the present case, it is impossible, in the opinion of this Court, to say that the jury would inevitably have come to the same conclusion if they had received the proper direction. That there was corroborative evidence is manifest, proceeding from the lips of the appellant himself. One might even go further, and say that there was strong corroborative evidence, which the jury might well have thought sufficient corroboration of the evidence of Sansun and Wassell. But that is not enough. The question is, was there corroborative evidence so cogent and convincing that the conclusion is not to be resisted that the jury, properly directed, would certainly have arrived at the same conclusion? In the opinion of this Court, the evidence in this case was not so strong as to entitle us to say that the jury must inevitably have come to the same conclusion if they had been properly directed. In these circumstances this Court is bound to allow this appeal and to quash this conviction.

Conviction quashed.

Solicitors—Webster, Butcher & Sons, for the appellant.

BEFORE

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ARTHUR WARN.

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10 *November.*

Sentence — Outstanding Offences taken into Consideration — Jurisdiction of Court.

A Court, when passing sentence, should not purport to take into consideration outstanding offences which it would have no jurisdiction to try.

Application for leave to appeal against sentence.

The applicant pleaded guilty on October 5, 1937, at the Warwickshire Quarter Sessions to a charge of larceny and was sentenced by the Deputy Chairman to three years' penal servitude.

No counsel appeared on either side.

In the course of delivering the judgment of the Court, refusing the application on the ground that in the circumstances the sentence was not too severe for the offence charged, DU PARCQ, J., said: The learned Deputy Chairman in sentencing the appellant said that he would take into consideration an offence of forgery, which the Court of quarter sessions had no jurisdiction to try, and also certain offences of obtaining money by false pretences which were committed within the jurisdiction of Northern Ireland, and which could not be dealt with by that Court of quarter sessions before which the appellant had appeared. Having regard to the view of this Court which I have already expressed, the matter cannot affect our decision to-day: but we think it right to say plainly that no Court has power to take into consideration, or should purport to take into

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consideration, cases which it has no jurisdiction to try. Therefore a Court of quarter sessions should not purport to take into consideration cases which are triable only at Assizes, and likewise no English Court should purport to take into consideration cases triable only in some other country.

Application refused.

BEFORE

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GEORGE WILLIAM ARTHUR CHARLES ALEXANDRA.

Indictment—False Pretences—Employment Fraud—Representation of Existing Fact—Allegation that Prisoner required Money only to secure himself against Breach of Contract by Employee.

An allegation that a prisoner falsely pretended "that he honestly required [a sum of money] only to secure himself against any breach by [an employee] of a certain contract" is a charge of the representation of an alleged existing fact sufficient to support an indictment for obtaining the money by false pretences.

Appeal against conviction.

The appellant was convicted at Middlesex Sessions on October 7, 1937, on two counts of an indictment charging him with obtaining money by false pretences, and was sentenced by the Chairman to twelve months' imprisonment with hard labour.

The particulars of offence of the first count on which the appellant was convicted were in the following terms: "George William Arthur Charles Alexandra on the 16th Nov. 1936, at Iver in the County of Buckingham, with intent to defraud,

obtained from Arthur Edwin Dormer £50 by falsely pretending that he, George Wm. Arthur Chas. Alexandra, honestly required the same only to secure himself against any breach by Dormer of a certain contract that day made with him." The other count was in the same form, the name of the person alleged to have been defrauded and the sum of money alleged to have been obtained being the only differences.

The following statement of facts is, in substance, taken from the judgment. The appellant was the patentee of a burglar alarm called " Corpatact " and carried on a factory. He had some dealings with a syndicate for the production of that apparatus, and it was found by him that some of his staff had been making use of their knowledge of his trade secrets. In November, 1936, he had three banking accounts, one at West Drayton in the name of his wife, one in his own name in London, and another in the same bank in the name of Corpatact. There was no more than £3 in any one of those banking accounts and there was no authority for withdrawal. In those circumstances the appellant advertised: " Required immediately for small factory taking on Government work an assistant to the proprietor. Guarantee necessary," and in answer he received a great number of applications. First of all, Dormer visited the factory, saw the appellant, and was offered £200 a year and 5 per cent. of the net profits. The appellant said that he required a guarantee of good faith, as there were certain specifications and patent papers which Dormer might see and it would be detrimental to the business if those became known to outsiders. Dormer thereupon offered a fidelity bond, but he was told by the appellant that that would not suffice. The appellant said that he was getting £50 as a guarantee of good faith from all the members of his staff, and that the money was to be placed in a separate account and was to be returned at the end of the period of service. Dormer was then handed an agreement and he paid £50 by cheque. In that written agreement the £50 was described as a guarantee

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of good faith and there was a provision for the return of the money on the termination of the agreement. He began his work on November 16. He asked for his salary, and was told that it could not be paid and that the appellant had unfortunately had to use the money for the time being, but expected to be able to replace it within a few days. In April, 1937, Dormer left and he got a worthless cheque for the sum of £83 6s. 8d.

In November, 1936, Moule answered an advertisement, and met the appellant, and afterwards received from him a letter in which he said that he had only just read the numerous applications. There was an interview between the appellant and Moule in London on Saturday, December 17. The appellant then asked for £25 as security for secrecy about his patent, and he was so anxious to get the money at once that he could not wait for it to be drawn out of the Post Office. Moule gave him a cheque on his father's account. That sum was paid into the account of the appellant's wife at West Drayton, which at that time had a credit balance of 4s. 2d., and £25 was drawn out again immediately. The agreement with Moule described the sum of £25 as a guarantee for safe custody of documents and secrecy. It was stated to be subject to interest at 5 per cent. and was to be returned on completion of service. Moule never got his money back.

B. J. M. MacKenna, for the appellant:

The counts on which the appellant was convicted did not charge the appellant with having made a false representation of an existing fact. The representation charged was merely a representation of the appellant's intention with regard to future user of the money which he was obtaining. [He referred to GOODHALL (1821), R. & R. 461; JOHNSTON (1842), 2 Moo. 254; LEE (1863), L. & C. 309.] Further, the summing-up was unsatisfactory. The difference between an alleged existing fact and future conduct was not sufficiently

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explained to the jury. Again, the jury were never warned that, before they could convict the appellant, they must find that Dormer and Moule were induced to part with their money by reason of a false pretence on the part of the appellant.

Rodger Winn, for the Crown:

It is true that the witnesses were never specifically asked what it was that induced them to part with their money, the whole contest between the Crown and the appellant at the trial being what the appellant said at the time.

THE LORD CHIEF JUSTICE: This appellant, George William Arthur Charles Alexandra, was convicted at the Middlesex Sessions of obtaining money by false pretences. He was sentenced to twelve months' imprisonment with hard labour and now appeals against conviction. He was indicted for the fraudulent conversion of three sums of money entrusted to him for safe custody, and in alternative counts he was charged with obtaining those sums by false pretences. In the result he was convicted upon the fourth count and upon the sixth count of the indictment. That document is now before the Court and the fourth count is in the following terms: "Statement of offence: Obtaining money by false pretences, contrary to section 32 (1) of the Larceny Act, 1916," and the particulars of offence are stated in these terms: "Alexandra on the 16th November, 1936, at Iver, in the county of Buckingham, with intent to defraud, obtained from Arthur Edwin Dormer £50 by falsely pretending that he, Alexandra, honestly required the same only to secure himself against any breach by Dormer of a certain contract that day made with him." The sixth count is in the same form; the only differences are that the name of Moule takes the place of the name of Dormer and the sum of money is £25 and not £50. The false pretence, therefore, which is alleged is that the appellant then honestly required the money only to secure himself against any breach by

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the person paying it of a certain contract made with him that day. [His Lordship then stated the facts as set out above, and continued.]

In those circumstances it is contended on behalf of the appellant, first, that this indictment is bad because what is charged is not a representation of an alleged existing fact, but a representation as to future conduct. Our attention has been directed to various cases, not the same as this case, in which these expressions have been construed and judgment has been given in relation to them. It is necessary to look at the very words of the indictment, and I repeat them. The appellant is charged with obtaining, with intent to defraud, certain money by falsely pretending that he honestly required the same only to secure himself against any breach by Dormer of a certain contract that day made with him. In our opinion, that is a perfectly good statement of an alleged existing fact, and the cases about future conduct have no bearing upon it. It is a matter of law that in a case of false pretences that which is relied upon must be a representation of an alleged existing fact.

Counsel for the appellant also complained of the summing-up, and he says, first of all, that the law upon the difference between an existing fact and future conduct was not clearly stated to the jury, or that it might have been more clearly stated. I agree that the law with reference to this particular false pretence might have been more clearly stated, but in our opinion it was sufficiently stated. In like manner, when it is said that the jury were not clearly and specifically directed upon the point that, before the appellant could be convicted, they must find that that which induced the victim to part with his money was a false pretence, again I agree that the law might have been more clearly stated, but in our opinion it was sufficiently stated and the nature of the case was such as to make it plain that, unless the jury believed what Dormer and Moule were saying was completely

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untrue and contradicted the written words of the agreement, the case was proved.

Mr. Winn has pointed out that the question what it was that induced them to part with their money was not put quite explicitly to the witnesses. It is unfortunate the question was not clearly and simply put, but again it seems to us that it was put with sufficient clearness in the circumstances of the case, especially in view of the written agreement, and that it was made clear that that which induced the persons who paid the money to pay it was the acceptance of the statement that the purpose for which the money was required was the purpose as stated in the indictment. In our opinion, apart from the mere battle of words, there is no ground to interfere with the conviction in this case, and the appeal must be dismissed.

Appeal dismissed.

Solicitors for the Crown : Ryland & Co., Slough.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE DU PARCQ.

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PERCY OGDEN SHARPE.
REGINALD AUDLEY STRINGER.

Conspiracy to Defeat the Course of Public Justice—Concealment and Destruction of Evidence after Commission of Crime—No Proceedings Commenced—Whether Criminal Offence—Criminal Procedure Act, 1851 (14 & 15 *Vict. c.* 100), *s.* 29.

It is sufficient to constitute the crime of conspiracy to defeat the course of public justice if persons conspire to conceal a crime which has been committed, although no proceedings are pending or have been commenced.

Appeals against conviction.

The appellants pleaded guilty at Sussex Assizes on December 6, 1937, to an amended indictment charging them that they, between August 28 and September 3, 1937, conspired together and with Alfred John Osborne and with other persons unknown to defeat the ends of public justice by concealing and destroying evidence of the commission of a crime. Sharpe was sentenced to three months' and Stringer to four months' imprisonment, both in the second division.

On Saturday, August 28, 1937, the appellants were proceeding together with certain other persons to a dance at the village of Bracklesham. Each of the appellants drove his own motor car, and on the way Stringer's car struck and injured a cyclist. Stringer did not stop. On arrival at Bracklesham he told the appellant Sharpe and they agreed to say nothing about it and to return home by a route devised to avoid going past the scene of the accident. Sharpe later proceeded alone to the scene of the accident and found an ambulance and helpers there, but said nothing of what he knew as to the cause of the occurrence. The bicycle was

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found with some red paint on it and subsequently police officers called on Stringer and inspected his car, which was painted red. The police officers found a tin of black paint in the car and also found that the head lamps were fitted with new bolts. Stringer, on being asked about the new bolts, said that he had had them from a carpenter named Osborne on a neighbouring estate. The next day Stringer went to Osborne and asked him to say that he had provided the bolts. Osborne told the agreed lie to the police, but later, when the police interviewed Stringer in his presence, admitted that he had made a false statement.

When the case came before the justices, they refused to commit the appellants for trial on the ground that the offence charged was not one known to the law. An application was then made to Charles, J., for leave to prefer a voluntary bill. Charles, J., granted the application and an indictment was preferred in the following terms: "Statement of offence: Conspiracy to defeat the ends of justice. Particulars of offence: Reginald Audley Stringer and Percy Ogden Sharpe, between the 28th day of August, 1937, and the 3rd day of September, 1937, in the county of Sussex, conspired together and with Alfred John Osborne and with other persons unknown to defeat the ends of public justice by concealing and destroying evidence of the commission of a crime, by attempting to suborn the said Alfred John Osborne to give perjured evidence, and by attempting to mislead police officers then investigating the said crime by statements which they knew to be untrue."

At the trial counsel for Stringer moved to quash the indictment, on the ground that the indictment did not disclose any offence known to the law, as there could be no offence of conspiracy to defeat the course of public justice unless proceedings were pending or had been commenced. Charles, J., held that the indictment did disclose an offence known to the law. The indictment was amended by substituting the word "persuading" for "attempting to

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suborn " and the words " to make an untrue statement in accordance with the said concealment " for the words " to give perjured evidence ", and the appellants pleaded guilty to it.

P. A. T. Harmsworth, for the appellant Sharpe.
Harold Brown, for the appellant Stringer.
Christmas Humphreys, for the Crown.

DU PARCQ, J. : These appellants, Percy Ogden Sharpe and Reginald Audley Stringer, pleaded guilty at the Sussex Assizes before Charles, J., to an indictment charging them, to put it quite shortly, with conspiracy to defeat the ends of justice. They were sentenced, Sharpe to three months, and Stringer to four months, both in the second division. They now appeal against conviction.

There was a long argument before the learned Judge about the indictment. What had happened was that, when the case came before the justices, the justices were persuaded that the offence with which the appellants were charged was not one which was known to the law. After the justices had refused to commit, the matter came before a learned Judge, and, as it happened, before Charles, J., who ultimately tried the case. An application was made to him to prefer a voluntary bill, and, as there were no depositions, the application was accompanied by proofs of the proposed evidence, in compliance with the rules. The point was made then, and again before the Judge at the trial, that the application was not in proper form because it did not state that to the best of the knowledge, information and belief of the applicant it was substantially a true case against the defendants. Charles, J., decided, and we agree, that there was nothing in that point, since the affidavit contained all the necessary information. In any case, this Court would not be prepared to go behind the decision of a learned Judge after he had exercised his discretion.

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The indictment which came before the learned Judge was in these words: "Conspiracy to defeat the ends of justice: Reginald Audley Stringer and Percy Ogden Sharpe, between the 28th day of August, 1937, and the 3rd day of September, 1937, in the county of Sussex, conspired together and with Alfred John Osborne and with other persons unknown to defeat the ends of public justice by concealing and destroying evidence of the commission of a crime, by attempting to suborn the said Alfred John Osborne to give perjured evidence, and by attempting to mislead police officers then investigating the said crime by statements which they knew to be untrue." There was a lengthy argument before the Judge whether that indictment disclosed any offence known to the law. The Judge decided that it did, and after that argument and that decision, the defendants pleaded guilty to an amended indictment. The indictment was amended by substituting the word "persuading" for "attempting to suborn", and the words "to make an untrue statement in accordance with the said concealment" for the words "to give perjured evidence".

The question which now comes before this Court is whether that indictment, as so amended, disclosed an offence known to the law. If it did not, then no doubt the appellants, though they pleaded guilty, might be entitled to have their convictions quashed. But if it does disclose an offence known to the law, then they must stand by their pleas of guilty, and it must be found that they committed the offence. The question for this Court, therefore, is whether persons who conspire to destroy evidence of the commission of a crime, and get persons to conceal a crime, and attempt to mislead a police officer, are guilty of the indictable offence of conspiracy? In the view of this Court, there can be no doubt that they are so guilty.

It is not disputed that there is an offence of conspiracy to obstruct the course of public justice. That offence is established by the Legislature in the Criminal Procedure Act

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of 1851 and is referred to in section 29. All that is left, therefore, of the argument before the learned Judge, with which this Court has fully acquainted itself, is that there can be no offence of conspiracy to defeat the course of public justice unless proceedings are pending or have been commenced. In other words, it is said that no crime has been committed by a person who conspires with others to help him to conceal what has taken place and persuades other persons to make untrue statements, unless proceedings have already begun. That seems to this Court to be a hopeless proposition, a proposition so absurd that it cannot form a part of the law of this country.

Public justice requires not only that people should not take steps to conceal a crime or destroy evidence once a summons has been served upon somebody, but also that every crime should be suitably dealt with, and a man who obstructs public justice as soon as a crime is committed and endeavours to avoid the consequences of his wrongdoing by conspiracy with others is just as much guilty of an offence as if he waits until after proceedings are actually pending. It is unnecessary to say more on a matter which can be said in a few sentences. It is only desirable to say that there is nothing whatever in the contention put forward in the argument which has been addressed to this Court. The appeals are dismissed.

Appeals dismissed.

Solicitors—Walmsley & Stansbury, agents for J. E. Dell & Loader, Shoreham-by-Sea, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE DU PARCQ.

RONALD HARLING.

1937.
20 *December.*

Rape—Girl under Sixteen—Necessity for Proof of Absence of Consent.

Observations on the necessity of proving absence of consent on a charge of rape on a girl under sixteen years of age.

Application for leave to appeal against conviction and sentence.

The applicant was convicted at Leeds Assizes on December 7, 1937, of rape upon a girl of thirteen years and was sentenced by Hilbery, J., to five years' penal servitude.

At the trial evidence was given that the girl, who was a weakling, was given a lift in the applicant's lorry, that they went into a wood together and that the applicant there had connection with her.

In the course of his summing-up Hilbery, J., said: "The charge here is that this man did what is called in law rape. That means that he had carnal knowledge of this child by force, and by force without her consent. A child of thirteen and a half, in the eye of the law, cannot consent. So in this case I tell you that there is no question at all whether she consented or not. But in order to constitute the offence of rape, although the child could not consent, the prosecution must satisfy you that he effected his purpose by overcoming such resistance as the girl offered, you being satisfied that she was offering resistance and that he was overcoming it. Did he convince you that no force was used to effect this purpose of having carnal knowledge of this child? If he

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did, then he is not guilty of rape, and you must acquit him. . . . Some children are of such an age that the mere fact that a man did it would mean that the man must have done it by force, because they would not know from what was happening whether to resist or not to resist."

No counsel appeared on either side.

HUMPHREYS, J. [after stating the facts]: The question in this case is whether the offence of rape was committed, although it is clear beyond dispute that the applicant had committed the offence of having carnal knowledge of a girl between thirteen and sixteen years of age. Some confusion appears to have arisen in the course of the trial between those two different offences. In the course of the opening, the Judge asked some questions of the prosecution, which seemed to indicate that there was some doubt and that he required some assistance as to the law. When the time came for summing up, however, the Judge summed up in terms which are unexceptionable. He told the jury that, to establish the crime of rape, the prosecution must prove that connection by a man with a woman has taken place without her consent and against her will.

It is desirable that this Court should restate the law, which is not subject to doubt, but which it may perhaps be useful to repeat, that while a girl under the age of sixteen is perfectly capable of consenting, and, as everyone knows who tries these cases, frequently does consent to an act of sexual intercourse with a man, the law has provided that such consent affords no defence to a man on a charge of carnal knowledge of a girl under sixteen; but there is no such provision as to the crime of rape. In every case of rape it is necessary that the prosecution should prove that the girl or woman did not consent and that the crime was committed against her will. It may well be that in many cases the prosecution would not need to prove much more than the age of the girl,

and in this case that fact, coupled with the fact that the girl was a weakling, is enough to prove that there was no consent on her part. Therefore this application for leave to appeal against conviction must be refused. [His Lordship then dealt with the application for leave to appeal against sentence, which was also refused.]

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Application refused.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRANSON AND MR. JUSTICE HUMPHREYS.

WILLIAM TENNANT ROBINSON.

1938.
17 *January.*

Bigamy—Invalidity of Second Marriage—Scotland—Failure to Comply with Residence Qualification—Whether Offence Complete—Offences against the Person Act, 1861 (24 & 25 *Vict. c.* 100), *s.* 57 (*a*).

The appellant during the life of his lawful wife went through a form of marriage with another woman in Scotland. The ceremony took the form of a declaration before witnesses and would have constituted a Scottish irregular marriage, provided that one of the parties had at the date of the ceremony a normal residence in Scotland or had resided there for twenty-one days preceding the ceremony. That condition, however, was not fulfilled in the present case and the ceremony, accordingly, was invalid.

Held, the validity of the second ceremony was immaterial, and the appellant was properly convicted of bigamy.

ALLEN (1872), L. R. 1 C. C. R. 367 followed.

Appeal against conviction (on certificate).

(*a*) By the Offences against the Person Act, 1861, s. 57: "Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland, or elsewhere, shall be guilty of felony, . . ."

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The appellant was convicted at the Central Criminal Court on December 9, 1937, of bigamy, contrary to section 57 of the Offences against the Person Act, 1861, and was sentenced by the Recorder to nine months' imprisonment.

The following statement of facts is taken, in substance, from the judgment of the Court of Criminal Appeal.

In January, 1937, the appellant was lawfully married at Coventry, and lived there with his wife till July, 1937. In that month he met a woman named Mabel Sarah Gray at Southend, and on September 25 went with her to Scotland. On September 29, at Gretna Green, Dumfriesshire, they declared themselves in the presence of witnesses to be man and wife, and at the time of the ceremony the appellant signed a statement that he had resided in Scotland for at least twenty-one days immediately preceding September 29.

Evidence was given by a member of the Scottish Bar that a marriage by declaration before witnesses was a binding marriage in Scotland, known as a Scottish "irregular marriage", provided that one of the parties had at the date of the ceremony a normal residence in Scotland, or had resided there for twenty-one days immediately preceding the ceremony; but that, owing to the condition of residence not having been complied with, this particular ceremony was void and that, on application to the sheriff, it could not have been registered.

Counsel for the defence contended that no offence had been committed by the appellant and relied on the following passage from the judgment of Cockburn, C.J., in ALLEN (L. R. 1 C. C. R. 367, at p. 376): "We must not be understood to mean that every fantastic form of marriage to which parties might think proper to resort, or that a marriage ceremony performed by an unauthorised person, or in an unauthorised place, would be a marrying within the meaning of the 57th section of 24 & 25 Vict. c. 100."

The Recorder gave judgment as follows: "The point which was raised introduces a matter of considerable interest

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and does not appear to have been touched by any authority during the last sixty-five years. . . . It has been proved that here the condition precedent has not been complied with. The effect was to make the ceremony invalid. The further question remains whether, notwithstanding the invalidity, the offence of bigamy has been committed. I think that it is quite immaterial that the accused has not fulfilled that condition. He has gone through the ceremony of marriage. It has been said that the ceremony was light-hearted. But although the ceremony was brief, it appears adequate, and produces legal status if the parties join hands and accept each for a then intended marriage. . . . I think the judgment of the Court of Crown Cases Reserved in ALLEN (*supra*) delivered by Cockburn, C.J., is very clear in expressing the guide which I ought to follow on this point. He says, at p. 375 : ' The words " shall marry another person " may well be taken to mean shall " go through the form and ceremony of marriage with another person " ' ; and it is, I think, clear that one has got to look to the purpose of the enactment, namely the Act of 1861, and also to the mischief to be prevented and the remedy which the Legislature intended to apply. The form adopted here quite clearly was recognised by the law as capable of producing a valid marriage, and the only reason why it turned out to be an invalid marriage was because the accused had failed to comply with the condition precedent. The same thing might have happened if the parties had been within the prohibited degrees of consanguinity, and for that reason the submission fails." He accordingly overruled the submission made on behalf of the defence, and the appellant was convicted and sentenced as above stated.

The Recorder granted a certificate under section 3 of the Criminal Appeal Act, 1907, on the question whether the form of marriage of September 29, 1937, constituted a bigamous marriage within section 57 of the Offences against the Person Act, 1861.

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E. J. P. Cussen, for the appellant.
Christmas Humphreys, for the Crown.

THE LORD CHIEF JUSTICE [after stating the facts:] In the course of the argument in the Court below, reference was made to ALLEN (*supra*), where the law was very clearly explained after the case had been argued before a Court consisting of no fewer than fifteen Judges. [His Lordship then cited the passages from the Recorder's judgment set out above, and continued.] The matter has really never been in doubt. It has not only been clear since 1872, but it was also made clear in the earlier case of BRAWN (1843), 1 C. & K. 144, where Lord Denman, C.J., said, at p. 145: "I am of opinion that the validity of the second marriage does not affect the question. It is the appearing to contract a second marriage, and the going through the ceremony, which constitutes the crime of bigamy, otherwise it could never exist in the ordinary cases; as a previous marriage always renders null and void a marriage that is celebrated afterwards by either of the parties during the lifetime of the other. Whether, therefore, the marriage of the two prisoners was or was not in itself prohibited, and therefore null and void, does not signify. . . ."

It is quite obvious that this appeal must be dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRANSON AND MR. JUSTICE MACNAGHTEN.

ELSIE FLORENCE CAREY.
ALBERT AMES.

1938.
7 February.

Sentence—Concurrent or Consecutive—Offences not taken into Consideration in Previous Sentence—Subsequent Trial and Sentence for Offence.

In October, 1937, the appellants were sentenced, A. to four years' penal servitude and C. to twenty-one months' imprisonment with hard labour for an offence of shopbreaking and larceny. Certain outstanding offences were taken into consideration when those sentences were passed, but a similar offence of shopbreaking and larceny committed by the appellants in August, 1937, was not taken into consideration. In January, 1938, they were tried for that offence and were convicted, and were sentenced to twelve months' imprisonment with hard labour and three years' penal servitude respectively, and those sentences were ordered to be consecutive to the sentences passed in October, 1937.

Held, as it was improbable that the Judge would have passed longer sentences than he actually did in October, 1937, if the offence committed in August, 1937, had also been taken into consideration, the sentences passed in January, 1938, should not be consecutive to, but concurrent with, the sentences passed in October, 1937.

Appeals against sentence.

At Buckinghamshire Quarter Sessions on January 3, 1938, the appellant Carey was convicted of, and the appellant Ames pleaded guilty to, an offence of shopbreaking and larceny committed in August, 1937. Carey was sentenced by the Deputy-Chairman to three years' penal servitude, and Ames to twelve months' imprisonment with hard labour, and the sentences were ordered to be consecutive to sentences of

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imprisonment and penal servitude passed on the respective appellants at Oxford Assizes in October, 1937.

The further facts are set out fully in the judgment.

No counsel appeared on either side.

THE LORD CHIEF JUSTICE: These two appellants, Elsie Florence Carey and Albert Ames, were charged, together with another person, at the Buckinghamshire Quarter Sessions on an indictment which charged them with shop-breaking and with stealing a quantity of goods to the value of £101, and £2 2s. 6d. in money, on August 26, 1937. Carey was convicted after a plea of not guilty. Ames pleaded guilty. On January 3, 1938, Carey was sentenced to three years' penal servitude, and Ames was sentenced to twelve months' imprisonment with hard labour. Both sentences were ordered to be consecutive to certain sentences passed at Oxford Assizes by Finlay, J., On October 22, 1937. On that occasion, Finlay, J., sentenced Ames to four years' penal servitude, and Carey to twenty-one months' imprisonment with hard labour for similar offences. The appellants now appeal, by leave, against their sentences.

The case with which Finlay, J., was dealing in October, 1937, was a case where a costumier's shop in Oxford had been broken into by Ames after it had been locked up on early closing day. A quantity of fur coats was collected in piles inside the shop, and £4 in cash was taken from the till, while Elsie Florence Carey kept watch outside the shop. She was dressed as a man. Another man waited in a motor car, in which she subsequently departed. Fortunately, however, a suspicious neighbour observed the number of the car, which was stopped by the police. The car was being driven by the other man, Swan, with Carey in it. In the car were two empty suitcases, some dust-sheets, and a key which fitted the doors of the back of the shop windows. On that occasion Carey asked for two other cases to be taken into consideration. They were cases of shop-breaking at

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Bognor and at Worthing, in which she and Ames had stolen about £367 worth of goods, some ten days before the case at Oxford. The Judge, in passing sentence, said that he regarded the case as one which called for a very severe sentence on the man, and hoped that a term of imprisonment might reform the young woman. The offence, the subject of this appeal, had already been committed before that sentence was passed, but, for some reason, presumably because it was not admitted, it was not taken into consideration. In the present case, a shop in Slough which was locked up on an early closing day, August 25, 1937, was broken into, and on the following day it was discovered that a quantity of goods had been taken away from it. It was exactly the same type of case as the case referred to in the indictment at Oxford. The appellants were both engaged in it, and both offences were planned and committed with the aid of a motor car. With regard to the case at Oxford, an appeal by Carey to this Court was dismissed. We then pointed out that she had five previous convictions, and had asked for two other cases to be taken into consideration. Ames appealed against that sentence, but abandoned his appeal.

The question we have to consider is this: If this case at Slough had been included with the other two cases taken into consideration by Finlay, J., in passing sentence at Oxford, would he have then passed a longer sentence than he did in fact pass? In other words, would he, on October 22, 1937, have passed a sentence longer than four years' penal servitude in the case of Ames, or a sentence longer than twenty-one months' imprisonment with hard labour in the case of Carey?

We are inclined to think that he would not, and that the fairer course would be to regard this offence at Slough as he would in all probability have regarded it if it had been admitted by these appellants and had been taken into consideration by him. We think, further, that the fair

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result of this appeal would be that these sentences passed at the quarter sessions at Aylesbury should not be consecutive to, but concurrent with, the sentences passed by Finlay, J., in Oxford. We cannot help observing that the very reasons which were offered by the Court of quarter sessions for passing the sentences they passed were precisely the same as those of Finlay, J., when he passed the sentences at Oxford.

Sentences reduced.

BEFORE

MR. JUSTICE CHARLES, MR. JUSTICE HUMPHREYS AND MR. JUSTICE DU PARCQ.

ILENA BERNHARD.

1938.
7 & 22 *March.*

Demanding Money with Menaces — Intent to Steal — Claim of Right Made in Good Faith — Honest Assertion of Claim Believed to be Lawful—Claim Unfounded in Law or Fact — Whether Sufficient — Jury to Decide whether Defence Negatived by Evidence—Larceny Act, 1916 (6 & 7 *Geo.* 5, *c.* 50), *ss.* 1, 30.

On a charge of demanding money with menaces with intent to steal, contrary to section 30 of the Larceny Act, 1916, the test is whether, if the money had been taken, it could properly be said to have been stolen, that is to say, obtained "fraudulently and without a claim of right made in good faith" and with the requisite intent prescribed by section 1 of the Act.

WALTON (1863), 9 Cox 268, followed.

A person has a "claim of right" if he is honestly asserting what he believes to be a lawful claim, even though it may be unfounded in law or in fact.

HEMMINGS (1864), 4 F. & F. 50; WADE (1869), 11 Cox 549; and CLAYTON (1920), 15 Cr. App. R. 45, followed.

The question whether the defence of "claim of right" is negatived by the evidence should always be left as a question of fact to the jury.

FARNBOROUGH, [1895] 2 Q. B. 484, followed.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on February 14, 1938, of demanding money with menaces with intent to steal, contrary to section 30 of the Larceny Act, 1916, and was sentenced by the Lord Chief Justice to nine months' imprisonment and was also recommended for deportation.

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The case for the prosecution was that the appellant, who was of Hungarian nationality, had lived abroad with a married man, referred to as " Mr. A ", as his mistress, and that in August, 1937, he had promised to pay her £20 per month for twelve months; that he had paid four instalments, but, on his failing to pay the instalment due on January 1, 1938, the appellant had come to England, demanded £160, the amount of the eight remaining instalments, and threatened Mr. A that, if he did not pay, she would send to his wife certain letters and photographs and expose him in the Press. The defence was that there was no intent to steal, as the appellant had " a claim of right made in good faith " within the meaning of section 1 of the Larceny Act, 1916 (*a*), inasmuch as she honestly believed that she was entitled to the money which she demanded.

The appellant stated in her evidence that the prosecutor had agreed to pay her a sum sufficient to cover all her expenses for a year, calculated at the rate of £20 a month; that at their parting he had paid her £80; that the balance of £160 was to be paid in January, 1938; and that when she came to England she believed that she was entitled to that sum.

The Lord Chief Justice directed the jury that there could not be a claim of right, though there might be a claim of wrong, where the claim was not one maintainable in law; that any claim which the appellant might have would not be maintainable in law, as being based on an immoral consideration; and that, in any circumstances, the appellant could not have had a claim of right for more than £20. After an absence of about forty minutes, the jury returned to Court and passed to the Lord Chief Justice the following

(*a*) By the Larceny Act, 1916, s. 1 : " For the purposes of this Act—(1) a person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof."

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note: "One member of the jury, although sharing the view of the remainder that the prisoner was guilty of endeavouring to obtain money by threats, will not agree to a verdict of guilty, because he holds the opinion that she honestly believed that the money claimed was due to her."

The Lord Chief Justice then further directed the jury that "on the admitted facts of this case there cannot be a claim of right. There might be a claim of wrong." The jury then, without retiring again, convicted the appellant.

John Phipps, for the appellant:

The Lord Chief Justice's view of the law was that, in order to establish a "claim of right made in good faith" within the meaning of section 1 of the Larceny Act, 1916, a defendant must show (i) that he actually had a claim maintainable in law; and also (ii) that such claim was made in good faith, and that he could not make something which was not a claim into a claim by thinking that it was a claim. It is submitted, however, that the correct view is that an honest belief in a right to the money demanded is always a good defence to a charge of stealing. All that was necessary for the appellant to establish in the present case was that she honestly believed that she was entitled to the money which she claimed. Further, it was not clear on the evidence what was the consideration, if any, for Mr. A's promise to pay. If the Lord Chief Justice was right in saying that the promise was made for an immoral consideration, it was made for a past immoral consideration, and the only thing that would prevent such a promise from being enforceable in law was the fact that it was not made under seal. Moreover, it was not correct to say that admittedly only £20 was due to the appellant in any event. There was a dispute on the evidence as to the amount which was owing, and this was an issue which should have been left to the jury. [He referred to HALL (1828), 3 C. & P. 409; HEMMINGS (1864), 4 F. & F. 50; WADE (1869), 11 Cox 549;

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CLAYTON, [1920] 15 Cr. App. R. 45; *Halsbury's Laws of England* (2nd ed.), Vol. IX, p. 497; *Stephen's History of the Criminal Law*, Vol. III, p. 124.]

G. G. Raphael, for the Crown:

There was no controversy that the appellant made a demand for money with menaces, and assuming that certain ingredients which would exclude an "intent to steal" were absent, it was the duty of the Judge so to direct the jury. Even where a claim of right honestly believed in exists, that claim may be destroyed by the circumstances in which it is put forward. There must be some relation between the menaces and the claim of right advanced. [He referred to DYMOND, [1920] 15 Cr. App. R. 1; [1920] 2 K. B. 260.]

CHARLES, J.: We are of opinion that this conviction cannot stand, and that the appeal must be allowed. We propose to put into writing the reasons for our decision.

Cur. adv. vult.

March 22.—The following written judgment was read:

CHARLES, J.: The appellant was tried at the Central Criminal Court before the Lord Chief Justice of England on an indictment which charged her with demanding money with menaces of a person, who was referred to during the trial as "Mr. A", with intent to steal the same, contrary to section 30 of the Larceny Act, 1916. She was convicted and sentenced to nine months' imprisonment, and the Lord Chief Justice recommended her for deportation. She appealed to this Court against her conviction, her principal grounds of appeal being that the learned Judge had misdirected the jury as to the meaning of the words "without a claim of right made in good faith", which are contained in the definition of stealing in section 1 of the Larceny Act, 1916, and had failed to leave to the jury for their decision the question whether the appellant, when she demanded

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money from the prosecutor, made the demand " fraudulently and without a claim of right made in good faith ".

This case presents some remarkable and very unusual features. It appears from the evidence that the appellant and the prosecutor met for the first time during a railway journey on the Continent in May, 1937. The prosecutor was a married man. The appellant, who is a Hungarian, was formerly a married woman, but the marriage had been dissolved. After this casual meeting an association began which lasted for some months, and although the prosecutor swore in answer to a question in cross-examination that the appellant was not his mistress, nobody acquainted with the undisputed facts of the case is likely to doubt that the appellant spoke the truth when she contradicted that statement. It was, however, common ground that by August, 1937, at the latest, any immoral relations which there may have been between them had ceased. According to the prosecutor, the appellant had told him at some time in June that she had lost her money on the Stock Exchange and that unless he could help her " she would have to go on the streets or commit suicide ". A letter from him to the appellant was produced in which he said: " I will do my best to give you the year which you wish so that you may be able to regulate your life," and eventually, in or about August, 1937, he agreed with her, according to his evidence, to pay her £20 a month for a year. The appellant, he said, asked for a lump sum payment, whereupon he paid her the sum of £80 to cover the four months September to December.

Having returned to England, he sent her no more money, and the case against the appellant was that in January she came to this country, sought out the prosecutor, and threatened to expose him to his wife and to the public by means of an announcement in a newspaper unless he paid her the sum of £160 forthwith. During one interview between them, the appellant's threats were overheard by a police officer, who had been within hearing, as the result

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of an arrangement with the prosecutor. It appeared from the prosecutor's evidence that the appellant had suggested to him that they should attend before the Hungarian Consul or a lawyer in order that the agreement between them should be put in writing.

The appellant gave a somewhat different version of the conversations in which she was alleged to have threatened the prosecutor. That part of her evidence which is material on this appeal may be summarised as follows. She said that the prosecutor had agreed to pay her a sum which would cover all her expenses for a year, calculated at the rate of £20 a month. At their parting he was to give her a cheque for as much as he could then afford, which turned out to be £80. The balance of £160 was to be paid in January, 1938. When she came to England in January she believed, according to her evidence, that she was entitled to £160, and she stated that she had taken the advice of a Hungarian lawyer. It is true that there is at least one answer in her evidence which appears to be inconsistent with the plain declaration which she made elsewhere that the whole amount of £160 was to be paid in January, but we have no doubt that there was material before the jury upon which they were entitled to find that the prosecutor promised to pay her, not by instalments of £20, but in two lump sums, the second payment of £160 to be made in January.

Upon this evidence, the case made by defending counsel in his address to the jury was that the prosecution had failed to prove an " intent to steal " on the part of the appellant, in that it was not shown that she acted " fraudulently and without a claim of right made in good faith ".

The Lord Chief Justice, in summing-up the case to the jury, read the material sections of the Larceny Act, and referred to the appellant's defence in these words: " To put her case at the very highest does it come to more than this: ' As according to the bargain, which was an immoral bargain

arising out of immorality, I was to have £20 a month for the then succeeding eight months, I thought it would be a fair and decent thing on his part to pay me £160 down in anticipation of eight months' instalments'? Well, whatever else that may be, it is not a claim of right; it is not a claim of anything which the law could recognise as a right and in good faith." A little later the following passage occurs in the summing-up: "Now I must direct you as a matter of law that there cannot be a claim of right in good faith within the meaning of section 1 of the Larceny Act so as to answer an allegation of stealing if the claim is one arising out of an immoral consideration and inconsistent with the terms even of a bargain made for an immoral consideration. You do not get anywhere near a claim of right." At the conclusion of the summing-up the jury retired. Forty minutes later they returned, and a note was handed to the Lord Chief Justice by the foreman of the jury, which was in these terms: "One member of the jury, although sharing the view of the remainder that the prisoner was guilty of endeavouring to obtain money by threats, will not agree to a verdict of guilty, because he holds the opinion that she honestly believed that the money claimed was due to her." The Lord Chief Justice thereupon further directed the jury as to the meaning of the words "a claim of right made in good faith". The substance of his further direction is contained in the following extract from the shorthand note: "In order that that kind of excuse may arise, there must be two elements: there must first of all be a claim of right, and secondly a claim of right made in good faith. Now, on the facts of this case, on the admitted facts of this case, there cannot be a claim of right. There might be a claim of wrong. The bargain that was made was a bargain arising out of an immoral consideration, and on any view of the matter that bargain could not give a claim to the present payment in January, 1938, of something coming due month by month up till August. . . . You cannot have a claim

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of right where the circumstances are such as to exclude the possibility of a legal claim." At the conclusion of this further direction the foreman of the jury put a question and was answered, according to the transcript of the shorthand note, as follows: " (The foreman), I want your Lordship's guidance so that this one juror should have his mind cleared. I understand that his belief is that, if the prisoner thought she had a claim, that would make a verdict of guilty of blackmail an incorrect verdict. (The Lord Chief Justice) No, I am much obliged to you. That is the kind of fallacy with which I have been endeavouring to deal. If a person thinks two and two make five, that gives rise to nothing except error. The question is not whether she thought something or other. The question is whether on the materials it was open to her to think she had a real claim of right and made in good faith. In other words, a person cannot make a right by thinking she has one." The jury then conferred, and it appears from the shorthand note that, while they were conferring, the Lord Chief Justice added this observation: " I hope you understand, members of the jury, that I am directing you in point of law on these facts there could not be a claim of right in the sense which is necessary. I direct you as a matter of law."

After this final direction, the foreman of the jury announced that the jury were agreed, and a verdict of guilty was returned.

After hearing the question arising on the appeal fully argued, and upon consideration of the relevant authorities, we were of opinion that the Lord Chief Justice's direction to the jury was erroneous in point of law, and that the conviction could not be allowed to stand. We now proceed to state our reasons for this conclusion.

We agree with the view which is implicit in the Lord Chief Justice's direction to the jury that the words " with intent to steal " in section 30 must be construed with reference to the definition contained in section 1 of the Act.

The test is whether, if the money had been obtained, it would have been obtained in such circumstances that it could properly be said to have been stolen: see WALTON (1863), 9 Cox 268. It is as to the true construction of the words "fraudulently and without a claim of right made in good faith" that we differ from the opinion of the Lord Chief Justice. If the matter were *res integra*, there would, no doubt, be much to be said for the view which found favour with the Lord Chief Justice, that the words "claim of right" cannot be read as including a claim which is unfounded in law. We are, however, bound by a long series of decisions, many before and one at least subsequent to the Larceny Act, 1916, to hold that this view is incorrect, and that a person has a claim of right within the meaning of the section if he is honestly asserting what he believes to be a lawful claim, even though it may be unfounded in law or in fact. The material words in section 1 of the Larceny Act, 1916, are declaratory of the common law, and a long and unbroken chain of authority supports this proposition.

The learned author of *East's Pleas of the Crown*, dealing with the defence "That the goods were taken on a claim of right", said: "And here it may be proper to remark, that in any case if there be any fair pretence of property or right in the prisoner, or if it be brought into doubt at all, the Court will direct an acquittal." (*East's Pleas of the Crown*, Vol. 2, p. 659.)

Mr. Phipps, in his able argument on behalf of the appellant, directed our attention to the following passage in *Stephen's History of the Criminal Law of England*, Vol. III, p. 124: "Fraud is inconsistent with a claim of right made in good faith to do the act complained of. A man who takes possession of property which he really believes to be his own does not take it fraudulently, however unfounded his claim may be. This, if not the only, is nearly the only case in which ignorance of the law affects the legal character of acts done under its influence." To the same effect is

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the statement of the law in paragraph 856 of the title "Criminal Law", *Halsbury's Laws of England* (2nd ed.), Vol. IX, p. 497, contributed by, among others, the late Avory, J.: "To prevent the taking from being felonious, the claim or right must be an honest one, though it may be unfounded in law or in fact." Illustrations of the application of this principle, which we conceive to be firmly established in our law, are to be found in HEMMINGS (1864), 4 F. & F. 50; WADE (1869), 11 Cox 549; CLAYTON, [1920] 15 Cr. App. R. 45. It follows, in our judgment, the proper answer to the question which troubled at least one of the jury would have been that, if the prisoner honestly thought that she had a claim, she was entitled to be acquitted, even though she was wrong in so thinking.

Further, we are of opinion that neither the nature of the consideration for the alleged bargain nor the evidence given as to the terms of that bargain, justified or supported the view which the Lord Chief Justice so clearly expressed to the jury that the appellant's defence of a claim of right could not be maintained.

In our opinion, the agreement sworn to by the prosecutor was not made for an immoral consideration, inasmuch as illicit relations between the parties had ceased, and their renewal was not contemplated, at the time when it was made. It was unenforceable only because of want of consideration. The law is succinctly and correctly stated in *Leake on Contracts* (8th ed.), p. 585: "A promise made in consideration of the cessation of an illicit cohabitation, or in consideration of past illicit cohabitation, or by way of compensation for seduction, is void simply for want of consideration; so that if made in the form of a bond or a covenant under seal, there is *prima facie* a valid contract." Without attempting to cite all the relevant authorities, we may refer to NYE *v.* MOSELEY (1826), 6 B. & C. 133; *Re* VALLANCE; VALLANCE *v.* BLAGDEN (1884), 26 Ch. D. 353; and the observations of Farwell, L.J., in HYAMS *v.* STUART

KING, [1908] 2 K. B. 696, at p. 726. It is not without significance that a precedent for a "Deed of covenant securing annuity to a past mistress" is to be found in *Key and Elphinstone's Precedents in Conveyancing* (11th ed., Vol. II, p. 568).

It is, we think, plainly impossible to found any argument against the existence in the appellant's mind of an honest belief in the justice and legality of her claim on her failure to appreciate the distinction which an English lawyer would have drawn between the legal results of a parol agreement and an agreement under seal. It is indeed by no means clear that the validity of the agreement, which was made in France, should be held to depend on the law of England, but, as no evidence was called as to the French law applicable in such a case, it is impossible (as indeed it is unnecessary) for us to inquire whether according to French law the appellant might have maintained an action against the prosecutor.

It remains to deal with that part of the Lord Chief Justice's direction to the jury which was based on the view that, on the appellant's own showing, no more than £20 was due to her from the prosecutor at the end of January, 1938. We have carefully examined the evidence, and, as we have stated earlier in this judgment, we are of opinion that there was certainly some evidence that the prosecutor had promised to pay the balance of £160 to the appellant in that month. The Lord Chief Justice had the advantage of seeing and hearing the witnesses, and it may well be that he was right in the opinion which he undoubtedly formed that this evidence ought not to be accepted. But however strong, and however well justified may be a Judge's view that there is a preponderance of evidence against the defence of a claim of right, the question whether that defence is negatived by the evidence must be left as a question of fact to the jury. If authority be needed for this proposition, it is to be found in FARNBOROUGH, [1895] 2 Q. B. 484. The judgment of the Chief Justice, Lord Russell of Killowen,

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in that case makes it plain that, even where the evidence on a charge of larceny is uncontradicted and appears to the presiding Judge to be conclusive, the question whether the *animus furandi* has been proved should be left to the jury as one of fact. In the present case we are satisfied that there was sufficient evidence to justify a jury in finding that the appellant entertained an honest belief in her claim against the prosecutor.

The learned counsel for the Crown suggested that some support for the view adopted in the summing-up might be found in the decision of this Court in DYMOND, 15 Cr. App. R. 1; [1920] 2 K. B. 260. As to this, it is enough to say that the Court was then dealing with different words in a different section, and that the judgment delivered by the Chief Justice, Lord Reading, at p. 263 of the report in the *Law Reports*, made it clear that the question then before the Court was being determined solely by reference to the precise words of section 29 of the Larceny Act.

The appeal is, therefore, allowed and the conviction quashed.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE DU PARCQ.

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Evidence—Character of Prisoner—Prejudicial Statement Inadvertently Made by Witness — Application by Prisoner's Counsel for Discharge of Jury — Duty of Court to Begin Trial Afresh Before New Jury.

Where a statement prejudicial to a prisoner has been inadvertently made to the jury by a witness, and counsel for the prisoner applies for the trial to be started afresh,

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the Judge ought to discharge the jury and begin the trial again before a new jury.

A police officer, who was a witness for the prosecution, was being asked in cross-examination about various articles which he had removed from the prisoner's house, and ultimately said: "There was some hemp, but this matter was relating to other things which, if mentioned here, might not be in favour of the prisoner." Counsel for the prisoner applied for the jury to be discharged and for the trial to be started afresh before a new jury, but his application was refused, and, after a strong warning from the Judge that the above statement was to be disregarded, the prisoner was convicted.

Held, the conviction must be quashed.

PECKHAM (1935), 25 Cr. App. R. 125, followed.

Appeal against conviction and sentence.

The appellant was convicted on January 27, 1938, at Leeds City Quarter Sessions of housebreaking and larceny, and was sentenced by the Assistant-Recorder to three years' penal servitude.

A police officer, who gave evidence for the prosecution, had stated that he had taken possession of articles at the appellant's house, and had handed them to the Director of the Forensic Science Laboratory at Nottingham. The following passage occurred in his cross-examination:

"Q. Among other things, you looked at the saws? A. Yes. Q. You took possession of them? A. Yes. Q. Did you send them to Nottingham? A. Yes. Q. What else is there that you sent to Nottingham that you have not told us about? A. I think it is all here now, apart from what is mentioned. Q. Apart from the saws? A. There was a plus four suit. Q. Any sawdust? Did you send any sawdust? A. No, Sir. Q. Scraps off the bench? A. To explain this matter, I was very interested in the wood in the cellar. That was most of my time, looking in the cellar. There was nothing else taken I can remember now, apart from what I have mentioned. There was some hemp, but this matter was relating to other things which, if mentioned here, might

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not be in favour of the prisoner. Q. Did you regard that explanation as necessary in answer to my question? A. Well, yes. Q. Were you unable of your own intelligence to devise any way in which that matter might not have been mentioned? A. I thought that was the better way to mention it. Q. Why? A. That it had best not be mentioned. Q. It should not have been mentioned had you been able to avoid it, should it? A. Well, I have not mentioned anything. Q. What you mentioned was this, that there was another matter which might be prejudicial to the accused were it to be mentioned. In your view, is that a way of disguising from the jury the fact that there is something else which, if mentioned, might be prejudicial to the accused? A. Well, there were other matters under investigation."

Counsel for the appellant then asked for the jury to be discharged, but the Assistant-Recorder refused to discharge the jury. In the course of his summing-up the Assistant-Recorder said: " At one period of the case there were questions put to a witness for the prosecution by defending counsel, who was asking him about certain things that were submitted to the expert witnesses, two of whom we have had called from Nottingham, whereupon the police officer said that there were some other enquiries and made some reference to another case. That, if it is evidence at all, has nothing to do with this case. We do not know anything about another case, whether the inquiries were with a view to charging this man or some other man, or whether he was going to be asked to assist the police. Anyhow, it was some other case. I direct you that, whatever else you consider, you consider that no more."

C. W. Salter, for the appellant:

Despite the clear warning given by the Assistant-Recorder, the answer of the police officer to the question put to him in cross-examination must have prejudiced the jury. The proper course was to discharge the jury and

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recommence the trial, as appears from the decision of this Court in PECKHAM (1935), 25 Cr. App. R. 125. In LESTER (1927), 20 Cr. App. R. 25, where the Court affirmed a conviction despite a prejudicial statement made by a witness, the position was different. In that case the question was so framed that the witness could not help making the prejudicial statement; here the statement was superfluously volunteered by the witness. [He was stopped.]

G. H. B. Streatfeild, for the Crown:

The Assistant-Recorder had a discretion in the matter, and he must have deemed that the accident which took place was the result of the cross-examination. PECKHAM (*supra*) was quite a different case from the present case, because in that case the prejudicial statement made by the witness was only one of a series of irregularities. It is submitted that, in any event, the case against the appellant was so overwhelming that the proviso to section 4 (1) of the Criminal Appeal Act, 1907, should be applied, inasmuch as the jury must inevitably have arrived at the same conclusion, even if no prejudicial statement had been made by the witness. This course was adopted by the Court in WILLIAMS AND WOODLEY (1920), 14 Cr. App. R. 135, where the appellants' previous convictions were accidentally disclosed to the jury, the case against them being an extremely strong one. On the other side of the line is the case of HEMINGWAY (1912), 8 Cr. App. R. 47, where the Court refused to affirm a conviction in similar circumstances, the evidence against the appellant being rather weak.

THE LORD CHIEF JUSTICE: This appellant was found guilty before the Assistant-Recorder at Leeds Quarter Sessions on an indictment charging him with breaking and entering a dwelling-house and stealing a quantity of jewellery of the value of £200. There was also a second indictment which charged him with waiting for an opportunity to commit an offence, contrary to section 7 of the Prevention

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of Crimes Act, 1871, which was ordered to remain on the file and not to be proceeded with except by order of the Judge or of the Court of Criminal Appeal. In the result the appellant was sentenced to three years' penal servitude, and now appeals against conviction and sentence.

Having regard to the view which the Court takes of the main question involved, it is not necessary to enter into subsidiary questions. There is no doubt that there was considerable evidence against the appellant, and there were some things urged, and proper to be urged, in his favour, but one thing is made very plain. [His Lordship then referred to the cross-examination of the police officer, the refusal of the Assistant-Recorder to discharge the jury, and the passage from the summing-up which is set out above, and continued:] It cannot be denied that a mischief had been done. The Assistant-Recorder did everything in his power to remove or mitigate it, but one thing he refrained from doing. For some reason, which it is a little difficult to fathom, he did not say in those circumstances that the proper course was that the jury should be discharged and the trial commenced anew. It seems unfortunate that he did not take that course, because the whole trouble might have been avoided in that way.

It is always a very difficult matter to arrive with certainty at the effect which a certain incident may have had on the minds of the jury, and it is important to remember that a jury consists not of one person, but of twelve persons. It may be profoundly difficult to arrive with anything like real certainty at the cause which operates on the mind of each one. Ought a prisoner to be called on to take that risk? Is it right that he should be exposed to the perils arising from inadvertent answers given in cross-examination? The appellant had not asked for the answer himself. The police officer was being cross-examined, and had volunteered a piece of evidence which can hardly have been anything but highly prejudicial. That the officer had no intention of

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creating prejudice is plain, but we have to consider what was the effect of what was done.

At this time the matter is not open to any real doubt. This Court has more than once expressed its view of the right and proper course to be taken in such circumstances as arose in the present case, and I cannot help thinking that the matter was put with sufficient clearness in the judgment of the Court in PECKHAM (1935), 25 Cr. App. R. 125, at p. 128: "It may be that in particular cases and on particular facts it is not necessary for a reference to be made in the summing-up to a prejudicial statement of this kind inadvertently made by a witness. Every case must be looked at in relation to its own facts. But there is a great difference between those cases and the present case in that here there was an application by counsel for the prisoner that the trial should be started afresh. It was in those circumstances that the Deputy-Chairman refrained even from alluding to the topic when he came to sum up." Here the Assistant-Recorder did in terms allude to what had happened, but did he get rid of the effect of what had happened? The judgment continues: "In the opinion of this Court, where a statement with regard to a prisoner's previous record is inadvertently made from the witness-box to his prejudice, and his counsel applies for the trial to be begun again before another jury, the Court ought to begin the trial again." Those words are sufficiently free from ambiguity. There are evidently three elements: (1) A statement with regard to a prisoner's previous record or of that kind inadvertently made from the witness-box; (2) the statement must be to the prejudice of the prisoner; (3) an application by the prisoner's counsel for the trial to be begun again before another jury. In November, 1935, this Court was of opinion that in those circumstances the trial ought to be begun again before another jury, and to that opinion we adhere.

It is not very profitable or satisfactory to enter on the sphere of inquiries with regard to the precise effect which

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may be produced on the mind of a juror—and still less on the minds of a collection of jurors—by a piece of evidence, but the principle laid down by this Court is that, where an irregularity manifestly takes place, then there ought to be an end of the trial in that form. It seems to us in a high degree dangerous to permit the trial to continue to its end where such an irregularity has occurred as that which here was inadvertently permitted. It is impossible to say at what conclusion the jury might have arrived if the irregularity had not occurred, and in those circumstances it seems to us that we have only one alternative. The question is not whether the words might with more care have been avoided, but whether the risk involved in refusing another jury should have been accepted. The risk seems to us too great to have been taken, and it follows that the appeal must be allowed and the conviction quashed.

Conviction quashed.

Solicitor for the Crown : Sir Charles McGrath, Wakefield.

The Court ordered that the indictment which had been left on the file should be proceeded with at the next Leeds Quarter Sessions, and that meanwhile the appellant should be admitted to bail.

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THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE MACNAGHTEN.

NICHOLAS WILLIAM GILBERT SLENDER.

1938.
4 & 5 April.

Evidence — False Pretences — System — Money Obtained on Earlier Occasion — Different Pretence Used — Whether Evidence of Previous Transaction Admissible.

The appellant and another man were convicted of having obtained money by false pretences from Miss S., the false pretence relied on by the prosecution being that they had come from Colesbourne, that they were obliged to spend the night in Cheltenham, and needed money for their expenses. Evidence was admitted to the effect that the same two men two days before their visit to Miss S. had visited P., who lived on the outskirts of Cheltenham, and had obtained money from him by the story that they wanted to go to a neighbouring aerodrome where they had work and required money for the journey, and it was proved that on that occasion the appellant had given a false name. The evidence was admitted on the ground that it tended to prove an intent to defraud.

Held, the evidence should not have been admitted, and the conviction of the appellant must be quashed.

W. FISHER (3 Cr. App. R. 176; [1910] 1 K. B. 149) applied.

Appeal against conviction.

The appellant was convicted at the City of Gloucester Quarter Sessions on March 4, 1938, of obtaining money by false pretences, and was sentenced by the Recorder to nine months' imprisonment with hard labour and three years' police supervision.

The false pretence alleged in the indictment, which was ultimately relied on by the prosecution, was that the appellant and another man named Deacon, who was indicted with

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him, had on January 24, 1938, obtained 30s. from Miss Sampson by falsely pretending that they had come from Colesbourne and that they were obliged to spend the night in Cheltenham and required money for their expenses. The prosecution called in evidence a Mr. Price, who lived on the outskirts of Cheltenham. He said that on January 22, 1938, the same two men had visited him, and had told him that they wanted to go to an aerodrome at Rissington, where they had work, and required money for the expenses of their journey there. He said further that he believed their story and gave them £1 in consequence of it, and that the appellant promised to pay him back, and wrote out an I.O.U. in which he gave a false name. He also stated that on January 24, 1938, the same two men had visited him again and told him that they had missed an omnibus on the 22nd, and had to stay in Cheltenham and required more money. The material portions of the evidence and of the summing-up appear fully in the judgment.

Stephen Benson, for the appellant:

The evidence of Price that a false pretence was made to him on January 22 ought not to have been admitted. He said that the appellant had told him that he and Deacon had obtained work at a neighbouring village and had no money for the omnibus. Then there was a second visit in which the appellant did mention that he was stranded in Cheltenham, but the false pretence was not the same as that alleged to have been made to the prosecutrix on January 24. The case is analogous to W. FISHER, 3 Cr. App. R. 176; [1910] 1 K. B. 149, where the Court of Criminal Appeal held that, on an indictment charging the defendant with obtaining a pony and cart by false pretences on June 4, 1909, evidence was wrongly admitted that on May 14 and July 3 of that year the defendant had obtained provender from other persons by false pretences different from those alleged in the indictment. An I.O.U. was put in at the trial as evidence

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that the appellant, when interviewing Price, had used a name different from the name he gave to the prosecutrix. This could not have been put in if the evidence of Price were inadmissible.

Apart from this, the Recorder misdirected the jury in directing them that if they convicted one of the defendants they must convict the other also, and although he corrected this direction later in the summing-up, the jury may have been misled.

R. Hutton, for the Crown:

It is submitted that Price's evidence was admissible. In W. FISHER'S CASE (*supra*) the false pretence was alleged to have been made to obtain a pony and cart, whereas the additional evidence submitted related to obtaining provender. Channell, J., said ([1910] 1 K. B., at p. 152): "Whenever it can be shown that the case involves a question as to there having been some mistake or as to the existence of a system of fraud, it is open to the prosecution to give evidence of other instances of the same kind of transaction, notwithstanding that the evidence goes to prove the commission of other offences, in order to negative the suggestion of mistake or in order to show the existence of a systematic course of fraud." In the present case it is impossible to divorce the story told by the appellant and Deacon on the Saturday, when the appellant gave the name of Smith, from the story they told to the prosecutrix on the Monday evening, when the appellant gave his name as Ted Williams. The two sets of representations were much closer than those in W. FISHER'S CASE (*supra*). The two visits to Price on January 22 and January 24 were part of the same system and cannot be separated. There is also the fact that the appellant told lies by giving a false name and that is evidence of intent to defraud. In these circumstances the conviction ought to stand.

HUMPHREYS, J.: The appellant was convicted by a jury

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before the Recorder at Gloucester Sessions of two small offences, consisting of obtaining with intent to defraud two sums of 30s. each from a Miss Sampson, who lives on the outskirts of Cheltenham. He applied to this Court for leave to appeal against that conviction, and he appears to have settled his own notice of appeal. He inserted in that notice a number of reasons, but it is necessary to refer to only one, which he puts in this way: "The additional evidence the police got at the last minute was nothing whatever to do with this case of Miss Sampson, and the Recorder ordered an identification parade for me and the other man what was with me in this case of Miss Sampson." Then he goes on to say that Mr. Price gave evidence against him, and he submits that that evidence was wrongly admitted. The matter having come before the Judge in chambers upon that point, and, as we are told, on other grounds, which may be summarised as contending that the trial was generally unsatisfactory, the Judge gave leave to appeal, and the matter has been argued on each side before this Court.

The case which was tried at quarter sessions was a case of extreme simplicity, very clear, and apparently quite conclusive. The false pretences alleged were several. The first false pretence was that two persons, the appellant and another man, had obtained 30s. from Miss Sampson by falsely pretending that they had just been involved in a lorry accident at Colesbourne, that Amos Deacon, who was the other man, had been driving the lorry, and that he was suffering from the effects of the accident. It was admitted by the prosecution, and ruled by the Recorder, that this false pretence was not proved. The false pretence relied upon by the prosecution was this: that they had both come from Colesbourne, and would have to spend the night in Cheltenham until the police had made inquiries, and needed money for their expenses in Cheltenham.

The evidence of Miss Sampson was shortly to this effect. She said that on Monday, January 24, the two men came

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to her house at about 7 o'clock in the evening. They said that they had had a lorry accident at Colesbourne, that Deacon was the driver, and was very much upset, that they would have to spend the night in Cheltenham, and that they wanted some money. They said that 15s. would do, and promised to return it to her. Thereupon she handed over 15s. to the appellant, who then said that the other man would also want some money for his own use, and another 15s. was handed over. She added that she saw them again on the next day, Tuesday, at about 4 p.m., when they came again and said that they had spent their money, and that Deacon's foot, which had been injured in the accident, was badly hurt and had been dressed in hospital, or, at all events, had been dressed somewhere, and that they wanted some money. She said in evidence: "I asked Mr. Slender if they wanted any more money." She was asked: "What did Slender say to that?" The answer was: "Of course he agreed." Then she was asked: "How much did you hand over?" She replied: "I handed them another 30s. and they promised they would repay the money." She was cross-examined with the object of showing that it was not on account of the false pretence laid in the indictment that she parted with her money, but she made it perfectly clear that it was. She made it clear that it was because they said that they had had an accident at Colesbourne and had to stay the night in Cheltenham, and, to use her expression, "they were stranded", that she gave them the money. The prosecution called evidence to prove that these statements were absolutely false. It was proved that the two men were living in Cheltenham, that they were brothers-in-law, each of them being on the dole, that the work they were doing had nothing whatever to do with driving a lorry, that neither of them had a licence for driving a lorry, and that the work they were engaged upon was compulsory relief work for the local authority. If that evidence was believed, and it was not cross-examined to, it was quite

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clear that they had made completely false statements, and that as a result they had obtained Miss Sampson's money. The question might well have been left to the jury whether in those circumstances they had obtained the money by those false statements with intent to defraud, but, for some reason or other, perhaps to add to the strength of the case, it was thought desirable by the prosecution to bring in evidence of another fraud committed by these two men two days before in Cheltenham, and for that purpose the prosecution called Mr. Price.

If, on a charge of obtaining money by false pretences, evidence is to be called relating to some other offence which is not charged in the indictment, that evidence can be given only within certain clearly defined and closely circumscribed limits. There are many judgments of this Court, and of other Courts, showing what these limits are where the charge is one of obtaining money by false pretences. The case usually referred to as the leading case, and the one referred to in the present case, is W. FISHER, 3 Cr. App. R. 176; [1910] 1 K. B. 149. The judgment of the Court of Criminal Appeal was delivered by Channell, J., and part of that judgment was quoted to us by counsel for the Crown. The important words, however, which were not read to us, are in the passage which comes before the one which was read to us, and it is well that that part of the judgment, which is material to this case, should be read. Channell, J., after referring to the facts, said ([1910] 1 K. B., at p. 152): "The question is whether this evidence was admissible on the authority of the cases in which it has been held that evidence is admissible to prove that the prisoner has committed other offences besides the one charged in the indictment. The question is one which has frequently come before this Court and before Judges at the assizes, and it is one that is not always easy to decide. The principle is clear, however, and if the principle is attended to I think it will usually be found that the difficulty of applying it to

a particular case will disappear. The principle is that the prosecution are not allowed to prove that a prisoner has committed the offence with which he is charged by giving evidence that he is a person of bad character and one who is in the habit of committing crimes, for that is equivalent to asking the jury to say that because the prisoner has committed other offences he must therefore be guilty of the particular offence for which he is being tried. But if the evidence of other offences does go to prove that he did commit the offence charged, it is admissible because it is relevant to the issue, and it is admissible not because, but notwithstanding that, it proves that the prisoner has committed another offence." The passage after the one I have just read was the one relied upon by counsel for the Crown. That passage, however, consists of illustrations and examples given by Channell, J., of cases which illustrate the application of the principle to particular cases, and, in the course of giving those examples, he uses the expression "system of fraud". The word "system" is perhaps an elusive word; it sometimes gives difficulty to persons who have to construe it, in that they ask themselves "system of what?" The judgment of Channell, J., makes the meaning of the expression "system" quite clear by the words he uses at p. 153: ". . . if all the cases had been frauds of a similar character, showing a systematic course of swindling by the same method, then the evidence would have been admissible."

That being the principle upon which evidence relating to another charge can be called, counsel for the Crown called Mr. Price, who lives quite close to where Miss Sampson lives, just outside Cheltenham. He spoke to an incident on January 22, a Saturday, two days before the men saw Miss Sampson. He said that the two men called at his house between 5.30 p.m. and 6 p.m. The appellant Slender said that they were down on their luck, that they wanted to go to Rissington where they had work to go to at the aero-

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drome there, that they wanted to get the 6.50 p.m. omnibus for that purpose, and that they wanted some money. Mr. Price said that he was impressed, and believed that story, and that he handed over one pound, and that Slender said he would pay him back at the rate of 5s. a week, went inside the house and wrote out an I.O.U. in which he gave the name of Smith.

In the judgment of this Court, that evidence was entirely inadmissible on a charge of obtaining money on the following Monday from Miss Sampson by the false pretence alleged in the indictment. It did not assist the prosecution to prove what they had to prove, nor did it tend to prove either that the statements were made to Miss Sampson or that they were false. Nor were the false pretences in the case of Mr. Price the same as in the case of Miss Sampson. The statement made was quite different, in fact exactly opposite. In the earlier case the men said that they wanted the money because they wanted to go to some other place. [His Lordship referred to the evidence in detail and to the summing-up, and continued.]

In our view, it was most unfortunate that the Recorder should have dealt with the question of intent to defraud by saying that the evidence of it was the evidence offered by Mr. Price—namely, that the appellant had used different names. The Recorder goes on to refer to the evidence of Mr. Price, and he says: "You will remember that Walter Price was the man who said that on Saturday, January 22—that is, the Saturday before the charge in this case—these two men, whom he identified at an identification parade, came to him and told him this story that they were going to catch a bus to Rissington Aerodrome, where they were going to get work. Now, chronology in this case you may regard as of some importance, as showing, not that these two prisoners were the sort of people to commit this offence, because as I told you before, it would not be fair to use it for that purpose, but that they had quite a definite system

in their minds, or in the mind of Slender, with which the other prisoner acquiesced, of either obtaining, or attempting to obtain, money from such people as could be induced to part with it." What was in the mind of the Recorder when he used that expression it is difficult to say, but that it was a satisfactory direction cannot be said. The Recorder had apparently formed the opinion, although he did not express it until after the accused had been convicted, that the evidence of Mr. Price was not evidence of another crime at all. After the two men had been convicted, he said, referring to the case of Mr. Price, that it would be difficult to sustain an indictment on that, because it was a promise to do something in the future. If that is so, it becomes increasingly difficult to understand how the evidence of Mr. Price became evidence in this case. Finally, the Recorder made this observation in his summing-up: "Does the fact that the same statement (that is to say, that they were obliged to stay in Cheltenham) had been made one hour before, and unsuccessfully made, to Mr. Price, who had already parted with his money, suggest to you that this was a systematic attempt by a false pretence to get money out of anyone who could be persuaded to part with it?" It is necessary to say no more than that that statement, in the opinion of this Court, does not assist the matter.

As a result of the conduct of this case and the various observations which the Recorder made from time to time in his summing-up, this Court has come to the conclusion that this conviction cannot be sustained. What view the jury would have taken if this inadmissible evidence had not been admitted it is not possible for this Court to say. The Court has already expressed the view that the case would have been simple and clear, and it might well have resulted in a conviction. Mr. Price's evidence, however, was clearly inadmissible, and highly prejudicial. It is impossible to say what effect that evidence may have had on the jury, and it is impossible for this Court to say that

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this jury must inevitably have come to the same conclusion if that evidence had not been admitted. For those reasons the Court has come to the conclusion that this appeal must be allowed, and the conviction quashed.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE MACNAGHTEN.

1938.
11 *April.*

WILLIAM MUIR.

Indictment — Rape — Charge of Indecent Assault on Another Woman at Another Time not to be Included.

In an indictment for rape a count charging the prisoner with indecent assault on another woman at another time should not be included.

Application for leave to appeal against conviction and sentence.

The applicant was convicted at Manchester Assizes on March 3, 1938, on an indictment containing four counts. The first two charged him with rape on the same girl on different occasions, the third with larceny from the father of the girl, and the fourth with indecent assault on a married woman on an entirely different occasion. He was found guilty on all counts and sentenced by Tucker, J., to concurrent terms of five years' penal servitude and six months' imprisonment with hard labour.

No counsel appeared on either side.

HUMPHREYS, J.: The only question which arises is whether this Court ought to take any action as the result

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of the charges of rape and indecent assault having been tried together, which, in the opinion of the Court, would much better have been separately tried. When a prisoner is charged with rape, it is very prejudicial that he should have to meet at the same time a charge of indecent assault on a different person at a different time. The charge of indecent assault was so unconnected with the charge of rape that it could not have been given in evidence in support of it.

On the whole, the Court is satisfied that in this case no miscarriage of justice has occurred, and that it should not interfere with the conviction. At the same time the Court thinks it right to say, for the assistance of those who have to draw indictments, that it is undesirable that two so dissimilar offences should be charged in one indictment. There can be little doubt that, if the applicant had been represented by counsel, counsel would have applied for the fourth count to be tried separately, and it may well be that the Judge would have acceded to the application. [His Lordship went on to say that, in the opinion of the Court, there were no grounds for interfering with the sentence.]

Application refused.

BEFORE

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DOUGLAS PERCY HARRISON.
PERCY HARRY HORACE WARD.
STANLEY JOHN WALLIS.
RONALD CHARLES SAMUEL GOODING.

Sexual Offence — Carnal Knowledge of Girl under Sixteen — Accused under Twenty-three—Defence of Reasonable Cause to Believe Girl over Sixteen—Necessity for Actual Belief on Part of Accused—Criminal Law Amendment Act, 1922 (12 & 13 *Geo.* 5, *c.* 56), *s.* 2.

On a charge against a man of twenty-three years of age or under of having unlawful carnal knowledge of a girl between the ages of thirteen and sixteen, the defence of reasonable cause to believe that the girl was over sixteen is not available where, although such reasonable cause might in fact have existed, the accused had not directed his mind to the question at all. The defence is available only where the accused had reasonable cause to believe, and did in fact believe, that the girl was over sixteen.

BANKS (1916), 12 Cr. App. R. 74; [1916] 2 K. B. 621, followed.

Appeals against conviction.

The appellants were convicted at the Central Criminal Court on March 9, 1938, of having unlawful carnal knowledge of a girl between thirteen and sixteen years of age, and were bound over by the Commissioner (Judge Beazley) for two years in the sum of £5. The appellants were all under twenty-three years of age at the date of the offence. Evidence was given at the trial that, although there might in fact have been reasonable cause to believe that the girl was over sixteen, none of the appellants had directed his mind to the question at all. The Judge directed the jury

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that, in order to avail themselves of the defence under section 2 of the Criminal Law Amendment Act, 1922 (*a*), the accused must in fact have believed that the girl was over sixteen.

Albert Crew, for the appellants:

The decision in BANKS (1916), 12 Cr. App. R. 74; [1916] 2 K. B. 621, that the accused must actually believe that the girl was over sixteen goes further than the statute and was wrong. The statute only provides that the presence of reasonable cause to believe that the girl was over sixteen is to be a valid defence: it does not say that the accused must in fact believe that she was over sixteen. Here reasonable cause in fact existed and the Judge was wrong in directing the jury that the accused must actually believe she was over sixteen.

G. G. Raphael, for the Crown, was not called on.

BRANSON, J.: These four appellants were convicted of having unlawful carnal knowledge of a girl under the age of sixteen. The question the Court is asked to consider is whether they could bring themselves within the proviso added to section 5 of the Criminal Law Amendment Act, 1885, by section 2 of the Criminal Law Amendment Act, 1922, which says: "Provided that in the case of a man of twenty-three years of age or under the presence of reasonable cause to believe that the girl was over the age of sixteen years shall be a valid defence on the first occasion on which he is charged with an offence under this section." These

(*a*) By the Criminal Law Amendment Act, 1922, s. 2: ". . . in the case of a man of twenty-three years of age or under the presence of reasonable cause to believe that the girl was over the age of sixteen years shall be a valid defence on the first occasion on which he is charged with an offence under this section." [The offence of carnal knowledge of a girl between the ages of thirteen and sixteen, which is made an offence by s. 5 of the Criminal Law Amendment Act, 1885.]

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youths were under twenty-three and sought to bring themselves under that proviso. The evidence made it clear that, although there might have been reasonable cause to believe that the girl was over sixteen years of age, none of the appellants had in fact directed his mind to the question at all, and therefore none of them could say that he did in fact believe that she was over sixteen. In circumstances of that sort it has been decided in BANKS (1916), 12 Cr. App. R. 74; [1916] 2 K. B. 621, that the proviso does not help the accused. Avory, J., said in that case (12 Cr. App. R., at p. 75; [1916] 2 K. B., at p. 622): "In our judgment the phrase 'had reasonable cause to believe' means 'had reasonable cause to believe, and did in fact believe', *i.e.*, that the person charged believed on reasonable grounds that the girl was at least sixteen years of age." Judge Beazley, in summing-up to the jury, put the law perfectly clearly in the language of the case of BANKS. In our opinion not only are we bound by the decision in that case, but we think it was a perfectly correct decision. The result is that these appeals must be dismissed.

Appeals dismissed.

BEFORE

MR. JUSTICE BRANSON, MR. JUSTICE HUMPHREYS AND MR. JUSTICE DU PARCQ.

WILLIAM TRIFFITT.

1938.
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Habitual Criminal—Procedure at Trial—Plea of Guilty to Substantive Offence—Sentence—Subsequent Trial as Habitual Criminal by Different Court — Irregularity Vitiating Conviction—Notice of Charge as Habitual Criminal—Proof of Service on Clerk of Court—Effect of Absence of Proof—Point not Taken in Court Below or in Notice of Appeal—Prevention of Crime Act, 1908 (8 *Edw. 7, c.* 59), *s.* 10 (4).

Where a person charged with an indictable offence is further charged with being a habitual criminal, the proper procedure is for his trial as a habitual criminal to follow on his conviction of or plea of guilty to the substantive offence, before sentence is passed for the substantive offence.

Where, therefore, a person charged with housebreaking and larceny, and further charged with being a habitual criminal, pleaded guilty to the substantive offences and was sentenced thereon and was tried on the following day before a differently constituted Court on the charge of being a habitual criminal and was convicted and sentenced thereon : —*Held*, that the irregularity in the procedure was such that, although there were otherwise no merits in the appeal, the conviction and sentence on the charge of being a habitual criminal must be quashed.

HUNTER (1920), 15 Cr. App. R. 69; [1921] 1 K. B. 555; and CONEY (1923), 17 Cr. App. R. 128; [1923] W. N. 164, applied.

By the Prevention of Crime Act, 1908, s. 10 (4): "a charge of being a habitual criminal shall not be inserted in an indictment . . . (*b*) unless not less than seven days' notice has been given to the proper officer of the Court by which the offender is to be tried, . . ."

Notice was given to the clerk of the Court in accordance with the above provision, but no proof was given of its

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service seven days before the trial. This point was not, however, taken at the trial or in the appellant's notice of appeal.

Held, that the service of such notice should have been proved on oath by someone, but that, since the point was not taken at the trial or in the notice of appeal, the Court of Criminal Appeal would not give effect to it.

TURNER (1909), 3 Cr. App. R. 103; [1910] 1 K. B. 346, and FOSTER (1909), 3 Cr. App. R. 173, followed.

Appeal against conviction and sentence as a habitual criminal.

The appellant was charged at Essex Quarter Sessions on April 4, 1938, with five cases of housebreaking and larceny and further with being a habitual criminal. He pleaded guilty to the charges of housebreaking and larceny, but not guilty to the charge of being a habitual criminal. The Deputy-Chairman then sentenced him to five years' penal servitude in respect of the substantive offences, but, being anxious that he should not be prejudiced on his trial as a habitual criminal, directed that he should be tried on that charge before a differently constituted Court on the following day by a jury composed of jurors who were not then present in Court. The appellant was accordingly tried on the charge of being a habitual criminal on the next day, when he was found guilty and sentenced to five years' preventive detention. At the trial no proof was given of service of notice of intention to prefer the charge of being a habitual criminal on the clerk of the Court.

John Phipps, for the appellant:

Although the Deputy-Chairman was apparently anxious that the appellant should not be prejudiced, the effect of what was done was in fact to prejudice him. The Deputy-Chairman was wrong when he said that a certain sentence must be passed on the first charge before the second charge was tried and that it would be waste of time to try the

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appellant as a habitual criminal unless they decided to send him to penal servitude on the first charge. By directing the appellant to be tried before another Court on the next day, the justices were treating the charge of being a habitual criminal as a separate count, which it was not: HUNTER, 15 Cr. App. R. 69, at p. 72; [1921] 1 K. B. 555. The appellant ought not to have been tried and sentenced as a habitual criminal by a different Court, but by the Court which sentenced him on the first charge.

[HUMPHREYS, J.: This case is not quite the same as HUNTER (*supra*). There the accused was tried by two different juries: here there was only one jury.]

[DU PARCQ, J.: Can you say that when a Judge has heard part of an indictment, no other Judge has jurisdiction in the matter?]

The case can be put as high as that. I rely on HUNTER (*supra*), where the Court held that the conviction could not stand, although there were no merits in the case.

[DU PARCQ, J.: In that case the second trial was held to be a nullity because the accused was tried as a habitual criminal by a jury who had no jurisdiction to try him. Here I suppose you say it was the right jury, but the wrong Judge.]

There is another point to which the attention of the Court should be drawn. The notice to the clerk of the Court of the intention to prefer the charge as a habitual criminal, which is required by the Act, was not proved. Service of this notice must be proved on oath: TURNER (1909), 3 Cr. App. R. 103, at p. 156; [1910] 1 K. B. 346, at p. 358. At the same time it is right to say that this point was not taken at the trial and is not in the notice of appeal, and in FOSTER (1909), 3 Cr. App. R. 173, in similar circumstances the Court refused to give effect to it.

Frank Phillips for the Crown:

HUNTER (*supra*) can be distinguished. There there

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were two trials by different juries, which was directly contrary to the rule. Here there was no trial on the substantive offence because the appellant pleaded guilty. The only question, therefore, is whether a different Judge can hear the trial on the second charge. That constantly happens, and it is submitted that he clearly can. In TURNER (*supra*) it was contended that the Judge was bound to sentence the accused on the first charge before proceeding with the second, and all that was held was that he was not bound to do so—it was not held that he must not.

[HUMPHREYS, J.: Have you considered CONEY (1923), 17 Cr. App. R. 128; [1923] W. N. 164?]

HUMPHREYS, J.: The appellant was charged at Essex Quarter Sessions on an indictment which contained a number of counts for housebreaking and larceny, and concluded with an averment that he was a habitual criminal. The appellant pleaded guilty to the several substantive counts of the indictment and was sentenced to five years' penal servitude. Of that sentence no complaint is made and no appeal is brought from it. But the appellant was then tried by a jury on the allegation that he was a habitual criminal. That was on the day following the day on which he pleaded guilty to the substantive offences. The jury found that he was a habitual criminal and he was then sentenced to a further period of five years' preventive detention. That sentence was passed by a Chairman and a bench of magistrates different from those who had sentenced him for the substantive offences. The appellant now appeals against the sentence of preventive detention and from the finding that he was a habitual criminal, by leave of a Judge.

The matter was argued on both sides in this Court, and it seems that what actually happened was this. The learned Deputy-Chairman was extremely anxious that the accused person should not be prejudiced, and it is right to say that the fault in the procedure, which in the opinion of this Court

clearly followed, was due to nothing else than the desire to show fairness to the prisoner. Accordingly, from the start the Deputy-Chairman is found inquiring from counsel for the prosecution what steps could be taken to prevent the jurors in Court from knowing anything about the matters which would be disclosed in dealing with the substantive offences. He therefore decided that the prisoner should be sentenced on the substantive offences and then sent to another Court to be tried by a jury who had not been present on the first day, and before another bench of magistrates, on the issue whether he was a habitual criminal. Unfortunately, that procedure was in law entirely wrong. It is contrary to the language of the Prevention of Crime Act, 1908, and to numerous decisions of this Court. The Act was passed in 1908, and from 1910 we find numerous occasions when the matter has been before this Court. Yet there is an apparent dislike on the part of tribunals to follow the procedure which has been laid down. The first case was JENNINGS (1910), 4 Cr. App. R. 120, in which Phillimore, J., observed during the course of the argument, at p. 121: "As the law is at present, when a prisoner is found guilty of the first charge, the charge as to being a habitual criminal must be tried at the same sessions, and cannot be postponed. You cannot split an indictment. I have written to the Home Secretary as to the desirability of a change in the law so as to enable a postponement to be made in a proper case." That was for the purpose of calling witnesses. In fact no change in the law has taken place. The headnote to that case in the Criminal Appeal Reports is: "Habitual criminal. An indictment for being a habitual criminal under the Prevention of Crime Act, 1908, must be tried immediately after the primary charge." That case has been considered on numerous occasions. In 1920 there was the case of HUNTER (1920), 15 Cr. App. R. 69; [1921] 1 K. B. 555. In that case the appellant had been tried by a jury and found guilty of offences of office-breaking and

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larceny. The indictment also alleged that he was a habitual criminal. The learned Deputy-Chairman who presided in that case, in the interests of fairness and justice, postponed the trial on the charge of being a habitual criminal to the next sessions, having sentenced the prisoner to three years' penal servitude in respect of the substantive offences. The prisoner was tried at the next sessions by a fresh jury who found that he was a habitual criminal and he was sentenced to a further term of five years' preventive detention. On appeal to this Court the conviction was quashed, the Court, following JENNINGS (*supra*), holding that the procedure required to be followed under the Act of 1908 was that the question whether the accused person was a habitual criminal must be tried by the same jury as had tried him for the substantive offence, and must also be tried immediately after that finding.

In the present case no jury convicted the appellant of the substantive offences, because he pleaded guilty. But, as I have stated, the justices who had to deal with sentence were two separate sets of justices. The first set sentenced him to five years' penal servitude on the substantive offences. Another set on another day in another Court dealt with the question whether he was a habitual criminal and decided on an additional sentence of five years' preventive detention. In our view, the matter was disposed of by a method of procedure which was so clearly wrong that there is scarcely need to say more. In CONEY (1923), 17 Cr. App. R. 128; [1923] W. N. 164, the appellant had pleaded guilty to an offence of housebreaking. Counsel for the prosecution then announced that there was also a charge of being a habitual criminal and said that he could not proceed with that charge unless a sentence of at least three years' penal servitude was passed on the substantive offence. In the quite erroneous belief that it was necessary for a sentence of penal servitude to be passed before the prisoner could even be tried on the charge of being a habitual criminal,

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that procedure was adopted and the prisoner then pleaded guilty to the charge of being a habitual criminal. No injustice was done, but nevertheless the Court (Lord Hewart, C.J., Roche and Branson, JJ.) held on the facts of that case that the sentence of preventive detention must be quashed. Lord Hewart, C.J., said (17 Cr. App. R., at p. 129): "A word must be said upon the procedure which was followed at the trial—a procedure not such as is approved by this Court, nor followed in other Courts, and a procedure which ought not to be followed." He added that, in the opinion of the Court, the sentence for the substantive offence ought not to be passed on a prisoner who was awaiting his trial on the charge of being a habitual criminal. The proper procedure was, and this Court repeats the proper procedure is, for the trial of an accused person as a habitual criminal to follow on his plea of guilty to or conviction of the substantive offence before he is sentenced for that substantive offence.

That would be sufficient to dispose of this case, but it is desirable to mention another point made by Mr. Phipps. It appears from the transcript that no proof was given of the service of the notice required to be given to the clerk of the Court seven days before trial of the preferment of a charge against the accused of being a habitual criminal. That is one of the steps required by the Act and is a condition precedent to trial on such a charge. In this case the proper notice was in fact given. It is with the papers which are before the Court and bears the date when they were received by the clerk of the Court, a date which was more than seven days before the trial. Therefore no injustice has been done. But our attention was drawn to TURNER (1909), 3 Cr. App. R. 103; [1910] 1 K. B. 346. That was a case in which the Court answered a large number of questions on the proper procedure on a charge of being a habitual criminal. One question was, was it necessary for the Clerk of the Peace to

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be called and sworn in order to prove the receipt of a notice of the original notice sent to him by the Public Prosecutor? In answering that question, Channell, J., said (3 Cr. App. R., at p. 156; [1910] 1 K. B., at p. 358): "It was not necessary that the Clerk of the Peace himself should be called to do it, but there must be some proof of the receipt of the notice. It may be, of course, by an officer, a clerk to the Clerk of the Peace—somebody in his office; it may be by the person who gave the notice; but in some shape or another, it is a matter of evidence; it is a fact to be proved. Under the terms of the statute the indictment may not be presented unless it is proved—and it has got to be proved, and it has got to be proved by sworn evidence of somebody." He then said that in his opinion the notice could not be treated as part of the records of the Court, and continued: "The date of the receipt cannot be taken from the document itself, and it is the date of the receipt that is the important point." That is a decision of this Court that such a document ought to be proved and proved on oath by someone.

Whether that ought to affect the judgment of this Court was considered in FOSTER (1909), 3 Cr. App. R. 173. In that case the Court, on the same point being taken, and finding that the point was not taken at the trial or in the notice of appeal, declined to pay any attention to it. This Court will follow the decision in FOSTER (*supra*) and give no effect to the point.

It only remains to consider whether, in view of the irregularity in the procedure, the finding of being a habitual criminal and the sentence of preventive detention ought to be quashed, or whether the Court ought to say that there was a mere irregularity. It will be observed that on previous occasions, whether any injustice was done or not, the Court has taken the view that such an irregularity of procedure is a question of law, and where the law has not been obeyed the Court has quashed the finding and the sentence. That

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is the course this Court will take, although the appeal has otherwise no merits whatever. The finding that the appellant is a habitual criminal is therefore quashed and the sentence of five years' preventive detention is quashed also.

Conviction quashed.

BEFORE

MR. JUSTICE BRANSON, MR. JUSTICE HUMPHREYS AND MR. JUSTICE DU PARCQ.

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Procedure—Reading Depositions at Trial—Plea of Guilty Before Examining Justices—Subsequent Plea of Not Guilty at Trial—Duty of Court to Adjourn for Witnesses to be Called —Criminal Justice Act, 1925 (15 & 16 *Geo. 5, c.* 86), *s.* 13.

Where an accused person has indicated to the examining justices his intention of pleading guilty and the justices have bound over the witnesses for the prosecution conditionally under section 13 of the Criminal Justice Act, 1925, but at the trial the accused pleads not guilty, the Court ought not to allow the depositions of the witnesses to be read to the jury under sub-section 3 of that section, but ought to adjourn the trial so that the witnesses (other than purely formal witnesses) may be called.

The provisions of section 13 (3) of the Criminal Justice Act, 1925, were not intended to apply to a case where the accused changes his plea and pleads not guilty at his trial. These provisions were enacted in order to save time and expense when no injustice could be done, and were not intended to be used so as in effect to abolish the ordinary method of trial by jury.

Appeal against conviction.

The appellant was convicted at Cheshire Quarter Sessions on April 4, 1938, of pavilion breaking and larceny, and was

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sentenced by the Deputy-Chairman to eighteen months' imprisonment with hard labour.

When the case was before the examining justices, the appellant, when he was given the statutory caution and was asked if he wished to say anything in answer to the charge, said: "I reserve my defence." But later he said: "I do not want to cause any unnecessary trouble and it will be unnecessary for the witnesses to appear, as I plead guilty to the charge." The examining justices accordingly bound over the witnesses for the prosecution conditionally under the Criminal Justice Act, 1925, s. 13 (1) (*a*).

At the trial at quarter sessions the appellant, when arraigned, pleaded not guilty and applied for an adjournment to enable him to call witnesses to prove an alibi. The Court, however, refused to grant an adjournment. None of the witnesses for the prosecution were present in Court, except one police witness, but their depositions were proved and read to the jury in accordance with the Criminal Justice Act, 1925, s. 13 (3), and after a short summing-up the jury found the appellant guilty.

The appellant appealed on the grounds that the trial

(*a*) By s. 13 of the Criminal Justice Act, 1925: "(1) Where any person charged before examining justices with an indictable offence is committed for trial and it appears to the justices . . . that the attendance at the trial of any witness who has been examined before them is unnecessary by reason of . . . the accused having pleaded guilty to the charge . . . the justices shall . . . bind him over to attend the trial conditionally upon notice given to him and not otherwise, . . ." By sub-s. 3 of that section: "Where any person has been committed for trial for any offence, the deposition of any person taken before the examining justices may, if the conditions hereinafter set out are satisfied, without further proof be read as evidence on the trial of that person, . . ." The conditions set out are that the deposition must be the deposition of, *inter alios*, a witness whose attendance is stated to be unnecessary in accordance with that section and that the deposition must be properly proved at the trial and be signed by the justice before whom it purports to have been taken.

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was generally unsatisfactory and that the summing-up was wholly inadequate.

E. Daly Lewis, for the appellant:

This was not a proper case for the application of section 13 of the Criminal Justice Act, 1925. It cannot be right that the appellant should lose his right of cross-examining the witnesses for the prosecution merely because he has stated his intention before the examining justices of pleading guilty. Moreover, what the appellant said before the examining justices did not amount to an unequivocal plea of guilty, since he also said: "I reserve my defence." The statements which he made were inconsistent. Further, the summing-up was entirely inadequate. The Deputy-Chairman never put the appellant's case to the jury at all.

J. F. Marnan, for the Crown:

Quarter sessions were right in acting under section 13 of the Criminal Justice Act, 1925, in this case. The appellant's application for an adjournment was not a *bona fide* application. The case was a clear one and it would have been waste of time and expense to bring the witnesses to the Court. The question of an adjournment was in the discretion of the Court. The summing-up is open to criticism, but was sufficient in this case, since the jury could not have come to any other conclusion than that to which they did come. There was, therefore, no miscarriage of justice.

HUMPHREYS, J.: The appellant appeals to this Court, by leave, against his conviction at Cheshire Quarter Sessions, held at Knutsford, of having broken into the pavilion of a bowling club and stolen 11s. The sentence passed by the Deputy-Chairman was one of eighteen months' imprisonment with hard labour.

When the charge had been made against the appellant and he had been arrested on it, he made a statement to the policeman who arrested him admitting the charge. He was

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brought before the justices and the justices decided to commit him for trial. Before doing so they administered the usual statutory caution, and in answer to it the appellant said the words, which one comes across so often, but which generally mean nothing: "I reserve my defence." Mr. Daly Lewis has informed the Court, though it does not appear on the documents, that the justices probably told the appellant that they proposed to commit him for trial and asked him if he wished any of the witnesses for the prosecution to attend at the trial, and the appellant then said: "I do not want to cause any unnecessary trouble and it will be unnecessary for the witnesses to appear, as I plead guilty to the charge." In the opinion of this Court a more unequivocal plea of guilty could not be found, and in those circumstances the justices acted, as they had a perfect right to do, under section 13 of the Criminal Justice Act, 1925, which provides: "(1) Where any person charged before examining justices with an indictable offence is committed for trial and it appears to the justices, after taking into account anything which may be said with reference thereto by the accused or the prosecutor, that the attendance at the trial of any witness who has been examined before them is unnecessary by reason of anything contained in any statement by the accused, or of the accused having pleaded guilty to the charge or of the evidence of the witness being merely of a formal nature, the justices shall, if the witness has not already been bound over, bind him over to attend the trial conditionally," that is to say, bind him over to appear at the sessions or assizes if he receives notice to appear. Sub-section 2 provides that after committal for trial the accused person should be informed that if he desires witnesses to appear at the trial he is entitled to have them. Sub-section 3 provides that the deposition of a witness which has been taken at the police court, after it has been proved in accordance with the provisions of the

Act, may without further proof be read as evidence on the trial of the accused.

In the opinion of the Court, no criticism can properly be levelled at the procedure of the justices, who in this case bound over all the witnesses for the prosecution conditionally, the accused having clearly stated his intention of pleading guilty. So it came about that at the trial on April 4, when the accused was put up to plead, none of those witnesses were present except one police officer. At the trial the accused, no doubt to the surprise of everybody in Court, pleaded not guilty, and very soon made it apparent that he wanted his trial postponed to the next sessions in order to prove an alibi.

It is quite likely, as Mr. Marnan has said, that that request seemed to the Deputy-Chairman, having regard to the accused's previous statement, to be not a *bona fide* request at all. But it was a request which the accused had a perfect right to make, and no possible injustice would have been done if it had been granted. He would have remained in custody, the witnesses for the prosecution would have been notified, and if the accused had given the names of the witnesses whom he wished to call they would have been called if they could have been found, and the trial would have taken place in the ordinary course of criminal cases in this country.

The Deputy-Chairman refused the application of the accused and, on the depositions being proved in accordance with the Act, they were read to the jury. On that evidence, and without seeing or hearing a single witness in the witness-box, the jury were invited to convict, and did convict, the appellant.

It is quite true that the language of section 13 appears, at all events, to contain no words which make such procedure improper, since, dealing with the deposition of each witness, the section provides that the deposition may be read as evidence. It seems to follow that, on the conditions

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laid down in the section being complied with, the depositions of all the witnesses may be read to the jury. But this Court is quite satisfied that such a course as was adopted in the present case was not intended by the statute and could never have been contemplated by Parliament. The result of it was to deprive the jury of the inestimable advantage—the one great advantage to which those who uphold the system of trial by jury always point—of the opportunity of not only seeing the witnesses who give evidence and hearing what they have to say, but also of observing their demeanour in the witness-box, and of themselves exercising the right, if they choose, to ask the witnesses questions, and, further, of hearing the witnesses cross-examined by the accused, if he so desires. Nothing of the sort took place here.

In our view, it was never contemplated by this Act, which was passed simply with the object of saving time and expense in cases where no possible injustice could be done to anybody, that it should be used to abolish in such a case as this the ordinary method of trial by jury.

It may well happen in another case, if this procedure is allowed, that an accused person himself may go into the witness-box and may call witnesses before the jury in support of his defence, and it is difficult to imagine anything more embarrassing for a jury than to be asked to decide on such a serious matter as the conviction of a fellow-being, when they have, on the one hand, merely the sworn statements of persons whom they have never seen or heard, and, on the other hand, evidence given in the witness-box.

In our opinion, it is eminently undesirable that in future such a course as this should be followed, and it is with a view to assisting those who may have to try such cases that we express the view given to-day.

In our opinion, in cases of a plea of not guilty at the trial, after the accused has pleaded guilty in the Court below, the Court ought to adjourn the case until some day

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when the witnesses, who have been bound over conditionally, can be brought together. If they can be brought together and the case tried at the same sessions or assize, so much the better; while if the delay involves the accused remaining in custody for a substantially longer period, no hardship is done to anyone, inasmuch as the accused has brought his prolonged incarceration on himself by his own failure to make up his mind whether he is guilty or not guilty—by saying on one day: "I don't want witnesses called," and on another day saying: "I do want to call witnesses." In this case it would have been far better if the Deputy-Chairman had exercised in favour of the appellant what is no doubt a discretion and had granted an adjournment of the case. Notice could then have been given at least to those witnesses for the prosecution who could not be described as formal witnesses, and, on the trial, the prosecution could have proved the facts of the case.

The Court has already said that what was done here cannot be said to be contrary to the language of the Act, and therefore on that matter alone this Court would not find itself in a position to quash the conviction. It is only necessary to deal with the ground on which leave to appeal was granted, and which has been argued to-day—that is, the question of the summing-up in this particular case.

If ever there was a case which required a careful direction from the presiding Judge, it was, surely, this case, where the jury did not have the advantage of hearing the witnesses, but merely had read to them the statements of the witnesses. The Deputy-Chairman thought that it was only necessary to remind the jury that the appellant had pleaded guilty when he was before the magistrates, and that it was unnecessary to remind them that he had pleaded not guilty at the trial. But not one word was said about the onus of proof or the law on the matter in these few lines which have been dignified with the term of "summing-up".

In the opinion of this Court it was no summing-up at

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all. Every accused person has the right to have his case presented to the jury by the presiding Judge. The appeal is allowed and the conviction quashed.

Conviction quashed.

Solicitors for the Crown : Haslewood, Hare & Co., agents for Lake, New & Ellis, Stockport.

BEFORE

MR. JUSTICE BRANSON, MR. JUSTICE HUMPHREYS AND MR. JUSTICE DU PARCQ.

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RICHARD WHIBLEY.

Children—Abandonment—Manner Likely to Cause Unnecessary Suffering or Injury to Health—Children Left at Juvenile Court where Magistrates Sitting — Children and Young Persons Act, 1933 (23 *Geo.* 5, *c.* 12), *s.* 1 (1) *and* (3).

The appellant left his five children under the age of sixteen at a Juvenile Court, where the magistrates were sitting, following upon the refusal of that Court to deal immediately with applications which he desired to make concerning the custody of other children. He was convicted of abandoning the children in a manner likely to cause them unnecessary suffering or injury to health, contrary to section 1 (1) of the Children and Young Persons Act, 1933.

Held, assuming the appellant's act amounted to an abandonment of the children, it was not an abandonment likely to cause them unnecessary suffering or injury to health, and the conviction must be quashed.

Appeal against conviction.

The appellant was convicted at West Kent Quarter Sessions on April 8, 1938, of abandoning his five children in a manner likely to cause them unnecessary suffering or injury to health, contrary to section 1 (1) of the Children

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and Young Persons Act, 1933 (*a*), and was sentenced by the Chairman to three months' imprisonment.

The appellant went to Chatham Juvenile Court on a November afternoon, when the magistrates were sitting, to make an application for the return to his custody of his daughter aged seventeen, and also for the return to the custody of his sister-in-law of three of her children. He was accompanied by his sister-in-law, and by five of his children, ranging in age from six to eleven years. When he was told that the applications could not be dealt with on that day, the appellant adopted a truculent attitude, and walked out of the Court with his sister-in-law, leaving the five children there.

E. N. Landale, for the appellant:

It is conceded that the appellant's act amounted to an abandonment of the children, but it was not an abandonment likely to cause them unnecessary suffering or injury to health.

B. H. Waddy, for the Crown:

There was evidence that the children were insufficiently clad, and a considerable time might have elapsed before they could be properly fed. The circumstances of the abandonment were such that it might have caused mental suffering to the children, and the question of the likelihood of such mental suffering was essentially one for the jury.

(*a*) By the Children and Young Persons Act, 1933, s. 1 (1): "If any person who has attained the age of sixteen years and has the custody, charge, or care of any child or young person under that age, wilfully . . . abandons . . . him . . . in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanour . . ."

By sub-s. 3: "A person may be convicted of an offence under this section—(*a*) notwithstanding that actual suffering or injury to health, or the likelihood of actual suffering or injury to health, was obviated by the action of another person."

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BRANSON, J.: This appellant was found guilty at West Kent Quarter Sessions on a count of an indictment which charged him with abandoning his five children in a manner likely to cause them unnecessary suffering or injury to their health, contrary to section 1 of the Children and Young Persons Act, 1933.

The facts were that the appellant went with his sister-in-law to the Juvenile Court at Chatham to apply for the return of his daughter into his custody and for the return of three of her children into her custody. He took with him five of his children, and when he was told at the Court that the applications could not be dealt with that day, he adopted a truculent attitude and said: "If I cannot have my own child back, I do not want the other five; you can have them; I will leave them there; they are not mine; you look after them." He then walked out of the Court, leaving the children there. The Chairman directed the jury: "I dare say some of you may think that for young children, even for boys of eleven, finding themselves alone in a Court, knowing quite well it is a Court, and surrounded by people who are what is colloquially described as 'limbs of the law', it would be a little bit frightening to young children and might be overawing to boys of eleven, and that there was at any rate a possibility that in leaving children like that in a Court, surrounded by these officials of the law, it might cause them, at any rate, some mental suffering and some anxiety as to what was to happen to them next." On that direction, the jury found the appellant guilty.

The main point urged on behalf of the appellant is that, assuming there was an abandonment, the abandonment was not, in the circumstances of this case, such as could properly be called an abandonment in a manner likely to cause unnecessary suffering or injury to health. It is not necessary to attempt any exposition of the circumstances in which the section might be invoked in the case of the

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abandonment of a child. The present case of leaving the children, as they were left, in a Juvenile Court, where magistrates were sitting for the consideration of cases relating to children, cannot possibly be brought within the section. It is to be observed that the section is in Part I of the Act, which is headed "Prevention of Cruelty and Exposure to Moral and Physical Danger". Those words give some kind of indication of the amount of suffering which the subsequent words were intended to cover. It does not appear to this Court that it is right to say that, if the circumstances are such that the child might be a little frightened or that some small mental suffering or anxiety might be caused, the case is one which comes within section 1 of the Act.

For these reasons it appears to the Court that this conviction was wrong and must be quashed.

Conviction quashed.

BEFORE

MR. JUSTICE BRANSON, MR. JUSTICE HAWKE AND MR. JUSTICE MACNAGHTEN.

SAMUEL WALTER VALE.

1938.
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Habitual Criminal—Procedure at Trial—Plea of Guilty to Substantive Offence—Adjournment—Case not Dealt with Further by Court—Trial on Next Day as Habitual Criminal by Different Court—No Irregularity in Course Adopted—Prevention of Crime Act, 1908 (8 *Edw.* 7, *c.* 59), *s.* 10 (4).

The applicant was charged with demanding money with menaces, and, on another indictment, with larceny, forgery and false pretences, and also with being a habitual criminal. On his plea of guilty to the substantive offences, the Court, without dealing further with the case in any way, sent him to

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another Court sitting at the same sessions to be tried on the charge of being a habitual criminal. On the following day he was tried on that charge, and, on conviction, was sentenced to a term of penal servitude followed by a term of preventive detention.

Held, the procedure adopted was perfectly proper, in that the trial on the charge of being a habitual criminal had followed on the plea of guilty to the substantive offences without the interposition of sentence or any other dealing with the case by the first Court.

TRIFFITT (*ante*, p. 169), explained and distinguished.

Application for extension of time within which to appeal against conviction and sentence as a habitual criminal at the Central Criminal Court on February 9, 1938, before the Commissioner (Judge Beazley).

The applicant was charged at the Central Criminal Court on February 8, 1938, before the Recorder with demanding money with menaces, and, on another indictment, with larceny, forgery and obtaining money by false pretences, and also with being a habitual criminal. He pleaded guilty to the substantive offences, and, without dealing further with the case in any way, the Recorder then sent him to another Court at the same sessions to be tried on the charge of being a habitual criminal. On the following day he was tried before the Commissioner (Judge Beazley) on that charge. He was found guilty, and sentenced to five years' penal servitude and five years' preventive detention.

No counsel appeared on either side.

BRANSON, J.: The applicant in his notice of appeal takes the point that it was contrary to the statute that his pleas to the substantive offences should be taken in one Court and that on the next day he should be tried in another Court on the charge of being a habitual criminal. He bases his case on TRIFFITT (*ante*, at p. 169), a decision of this Court on May 10, 1938. It is right that I should say

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a word or two about that case and its application to the present case as, in the opinion of this Court, even if the time were extended and leave to appeal were given, it would be of no use to the applicant.

TRIFFITT (*supra*) was a case in which the appellant had pleaded guilty to several counts of an indictment. His antecedents were then given in evidence before the Court and he was sentenced by that Court to five years' penal servitude. On the next day he was put up for trial on the charge of being a habitual criminal before a different chairman and a jury who had not been present in Court on the previous day, and was found guilty and sentenced to a term of preventive detention. The point of that case was that it was wrong to split an indictment so that one part of it was dealt with by one tribunal and another part by another tribunal. It is true that in that case the Deputy-Chairman of quarter sessions took the line which he did take out of undue tenderness for the prisoner and in order to be assured that the prisoner should not be tried on the charge of being a habitual criminal by a jury who had heard his previous history and the fact that he had pleaded guilty to some serious charges. This Court held in that case that the course which had been taken was fatal to the conviction and that the conviction must be quashed.

The present case is substantially different from TRIFFITT (*supra*), in that all that happened in the present case in the first instance was that the applicant was put up and asked to plead to the substantive offences and pleaded guilty. The moment that he pleaded guilty the proceedings ended for that day, and he was sent to be dealt with on his plea of guilty and on the further charge of being a habitual criminal by another Court. In delivering the judgment of the Court in TRIFFITT, Humphreys, J., according to some of the reports of that case, said that the trial on the charge of being a habitual criminal must always follow " immediately " on the plea of guilty to or conviction

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of the substantive offence. "Immediately" there means without the interposition of any other dealing with the case, without the Court hearing of the prisoner's history and sentencing him, and not without any interval of time. In the present case nothing was done between taking the plea and the trial on the charge of being a habitual criminal. The plea of guilty to the substantive offences having been taken, all the rest of the proceedings in relation to the indictment were adjourned to be dealt with by another Court. That seems to this Court to be a perfectly proper way in which to deal with a case of this kind.

Leave to extend the time would, therefore, be of no use to the applicant, and the application is refused.

Application refused.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HAWKE AND MR. JUSTICE MACNAGHTEN.

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Evidence—Character of Prisoner—Not in Issue—Cross-examination—Questions as to Former Bankruptcy—Whether Allowable—Criminal Evidence Act, 1898 (61 *&* 62 *Vict. c.* 36), *s.* 1—*Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *ss.* 26, 158, *as amended.*

Questions put to a prisoner in cross-examination with regard to a previous bankruptcy *held* to have been improperly allowed on the ground that they tended to show that he was of bad character.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court

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on May 5, 1938, on all counts of an indictment containing twelve counts and charging him with various offences of conspiracy and receiving goods which had been obtained by means of false pretences. He was sentenced by the Common Serjeant to concurrent terms of two years' imprisonment and five years' penal servitude.

At the trial evidence was given that the appellant had purchased goods from a firm known as Ashford and Nicholls and that that business was not a genuine business, but was carried on by Nicholls by way of a " long firm fraud ". The appellant had kept no books of account, but relied on certain invoices and receipts, and stated that he had taken no part whatever in the business of Ashford and Nicholls.

During the course of his cross-examination the following passage occurred:

Q. Did you find that not keeping books involved you in any financial troubles?

A. Not at all, on the contrary.

Q. What does " on the contrary " mean?

A. Well, I deal for cash. I pay for the transaction, and I know I cannot get into any trouble.

Q. What I am pointing out to you is that if you have not kept books for the last ten years, in 1933, under a system by which you did not keep books, you went bankrupt?

A. Yes; I did not go bankrupt for trading.

Q. You went bankrupt, never mind what it was for?

A. Yes.

Q. You went bankrupt?

A. Yes.

Q. When did you get your discharge?

A. In 1934 or 1935.

Q. Did you? Just think again. Do not you know when you got your discharge?

A. A year or two ago.

Q. You applied in April, 1934?

A. I will accept your date, if you will give it to me.

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Q. You were not discharged until 1937?

A. Possibly so.

Q. Are you telling the jury on your oath that you do not remember that you got rid of your bankruptcy last year?

A. No, I do not. I have carried on my business as usual. I have no other business.

Q. Having had that disagreeable experience of bankruptcy, did it not occur to you to keep books?

A. The bankruptcy had nothing to do with books or no books.

Q. No use at all keeping books—it would not make the slightest difference?

A. In my bankruptcy it could not.

Q. Or in your prosperity?

A. It would make no difference.

Q. Or in your honesty?

A. It is the same thing.

J. P. Eddy, K.C., and *Harry Allan*, for the appellant: The questions put to the appellant in cross-examination as to his bankruptcy in 1933 and his failure to obtain his discharge until 1937 were contrary to section 1 of the Criminal Evidence Act, 1898 (*a*). The appellant's case was

(*a*) By the Criminal Evidence Act, 1898, s. 1 (f): "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

"(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

"(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve impu-

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that he took no part whatever in Nicholls' business, but only bought goods from Ashford and Nicholls and resold them at a profit. Therefore the trading character of the appellant was of considerable importance. The effect of the questions put to the appellant in examination-in-chief was not to put his trading character in issue. The cross-examination of the appellant was contrary to the Act for two reasons: (1) because it was capable of meaning that the appellant had committed an offence other than that wherewith he was charged; and (2) because it tended to show that he was of bad character. As to (1), proceedings in bankruptcy are of a quasi-penal nature: *Re* HOWES, *ex p.* HUGHES, [1892] 2 Q. B. 628, *per* Bowen, L.J., at p. 632; *Re* A DEBTOR, [1910] 2 K. B. 59, *per* Fletcher Moulton, L.J., at p. 66. Under section 26 of the Bankruptcy Act, 1914, the discharge of a bankrupt may be refused or suspended if the bankrupt has committed any misdemeanour under that Act, and under section 158 of that Act (*b*) it is made a misdemeanour not to keep proper books of account in certain circumstances. The questions asked in this case

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tations on the character of the prosecutor or the witnesses for the prosecution; or

" (iii) he has given evidence against any other person charged with the same offence."

(*b*) By the Bankruptcy Act, 1914, s. 158 (1), as amended by the Bankruptcy (Amendment) Act, 1926, s. 7: " Any person who has been adjudged bankrupt . . . shall be guilty of a misdemeanour, if, having been engaged in any trade or business during any period in the two years immediately preceding the date of the presentation of the bankruptcy petition, he has not kept proper books of account throughout that period . . . or has not preserved all books of account so kept: Provided that a person who has not kept or has not preserved such books of account shall not be convicted of an offence under this section— (a) if his unsecured liabilities at the date of the receiving order did not exceed, in the case of a person who has not on any previous occasion been adjudged bankrupt or made a composition or arrangement with his creditors, five hundred pounds, or in any other case one hundred pounds . . ."

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related both to the delay in the appellant in getting his discharge and to his failure to keep books of account. The meaning of section 1 (*f*) of the Criminal Evidence Act, 1898, was considered by the Court of Criminal Appeal in A. T. ELLIS, 5 Cr. App. R. 41; [1910] 2 K. B. 746, where the Court held that certain questions which tended to show that the appellant had committed an offence other than that with which he was charged had been improperly allowed.

The meaning of " character " in that section was referred to in DUNKLEY, 19 Cr. App. R. 78, at p. 82; [1927] 1 K. B. 323, at p. 329, where it was stated in the judgment of the Court that " character " bore the meaning it was held to bear in ROWTON (1865), 34 L. J. M. C. 57, namely, evidence of general reputation only, having reference to the nature of the charge.

In MAXWELL *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 24 Cr. App. R. 152, at p. 173; [1935] A. C. 309, at p. 321, Lord Sankey, L.C., said: " The question whether a man has been convicted, charged or acquitted ought not to be admitted, even if it goes to credibility, if there is any risk of the jury being misled into thinking that it goes not to credibility but to the probability of his having committed the offence of which he is charged." The only object of the questions in the present case could be to show the jury that the appellant had an unsatisfactory business character and the effect of the question as to his honesty could only be to suggest that the appellant was dishonest.

John Maude, for the Crown:

The appellant is a person who has in the past shown considerable cunning in the type of business in which he was engaged. He kept no books and the object of the questions complained of was to show that as a person who had gone bankrupt he would be likely to be more careful about keeping books. It is not suggested that the appel-

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lant's character was put in issue. To say that a person has gone bankrupt is not to say that he is of bad character. The question as to his honesty referred to the present case and not to the bankruptcy. The fact that a bankrupt fails to get his discharge does not necessarily mean that he is of bad character. The discharge may be suspended for a variety of reasons and it cannot be said that the jury, even if they knew the Bankruptcy Act, must necessarily assume that there had been any dishonesty in the appellant's bankruptcy, still less that he had committed any offence. In fact the appellant could not have been prosecuted under section 158 of the Bankruptcy Act for failing to keep books, as the bankruptcy was for less than £500, and the jury were not entitled to assume that it was for more than that amount. It is submitted that the questions were properly allowed and the appeal ought to be dismissed.

THE LORD CHIEF JUSTICE: This appellant, Samuel Cohen, was convicted at the Central Criminal Court of conspiracy and receiving goods obtained by means of false pretences, and was sentenced to two years' imprisonment and, concurrently, five years' penal servitude. He now appeals against his conviction, by leave of this Court.

The grounds of appeal are numerous and cover much ground, but the only ground on which leave was granted was a complaint that the appellant was improperly cross-examined about his bankruptcy so as to convey to the jury that he was a person of bad character. The ground stated was that the cross-examination was contrary to the Criminal Evidence Act, 1898: "I was asked questions tending to show that I was of bad character." The law on this matter is as clear as it is important and rigorous. It is of the highest degree of importance, if the Criminal Evidence Act is to be effective, that, when a defendant goes into the witness-box, he should not be asked questions which have the effect of contravening the provisions of that statute.

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Section 1 of the Act provides as follows: "Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person." Then follows a series of provisos. Proviso (*f*) is in these terms: "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or (iii) he has given evidence against any other person charged with the same offence."

Every word of that proviso is important. The provisions of the statute are infringed not merely if questions are asked which show that the prisoner has committed or been convicted of or been charged with any offence other than that wherewith he is then charged or that he is of bad character; it is sufficient if a question is asked which tends to show that he has committed or been convicted of or been charged with such offence or is of bad character. It has been suggested by Mr. Eddy for the appellant that in the present case these provisions have been infringed not merely in one way, but in two separate ways. He puts them alternatively and cumulatively. He contends that the cross-examination which the appellant had to undergo had the effect of tending

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to show that he had committed other offences and also that he was of bad character.

In our opinion, the attempt to prove that the cross-examination here tended to show that the appellant had committed a bankruptcy offence has not been successful. We have listened with interest to the argument on the Bankruptcy Act, but that part of the argument, in our opinion, is not adequate. Other considerations, however, apply when one looks at the words "or is of bad character". Apart altogether from questions in regard to the commission of specific offences, the provisions of the statute are infringed if the cross-examination tends to show that the prisoner is of bad character. The appellant's character was not put in issue. There was one passage in the argument of counsel for the Crown which appeared to suggest that the appellant had put his character in issue, but, on the point being put to him expressly, counsel repudiated any suggestion that the appellant had given evidence of good character.

The question, therefore, is what was the true effect of the cross-examination. That is not the same question as the question what was in the mind of counsel who was cross-examining. We have heard what was in his mind. The question is what would in fact be conveyed to a reasonable body of jurymen. It is the fact that the appellant had on an earlier date been made bankrupt, and in cross-examination he was asked these questions: "Q. You went bankrupt? A. Yes. Q. When did you get your discharge? A. In 1934 or 1935. Q. Just think again. Do not you know when you got your discharge? A. A year or two ago. Q. You applied in April, 1934? A. I will accept your date if you will give it to me. Q. You were not discharged until 1937? A. Possibly so. Q. Are you telling the jury on your oath that you do not remember that you got rid of your bankruptcy last year? A. No, I do not. I have carried on my business as usual. I have no other business." Then come

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these questions: "Q. Having had that disagreeable experience of bankruptcy, did it not occur to you to keep books? A. The bankruptcy had nothing to do with books or no books. Q. No use at all keeping books—it would not make the slightest difference? A. In my bankruptcy it could not. Q. Or in your prosperity? A. It would make no difference. Q. Or in your honesty? A. It is the same thing."

The spirit of the law on this matter is clearly shown in A. T. ELLIS, 5 Cr. App. R. 41; [1910] 2 K. B. 746. In that case the Court, consisting of no fewer than five Judges, delivered a judgment in which this passage occurs, the reference being to the Criminal Evidence Act, 1898 (5 Cr. App. R., at p. 55; [1910] 2 K. B., at p. 757): "The object of the enactment is that it should not be suggested to the minds of the jury by means of any questions put to the prisoner that he has committed another offence." This passage has express reference to the words of the section which relate to the committing of another offence, but the same considerations apply with regard to the other matters mentioned in the section and to the words "or is of bad character". The judgment proceeds: "Any question or series of questions which would reasonably lead a jury to believe that it was being imputed to the prisoner that he had committed another offence would, in our opinion, tend to show that the prisoner had committed that other offence. It does not in the least depend on the object of the counsel putting the question. The words of the Act are not 'with a view to show', they are 'tending to show'. Moreover, if they do so tend, it is quite immaterial whether the evidence would be admissible or the question admissible on other grounds. As we read the statute, when a prisoner is charged with offence A, questions tending to prove offence B are not to be asked unless the proof of offence B is evidence of offence A. If it were otherwise the protection of the prisoner would be liable to be destroyed by a side wind." Precisely the same kind

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of considerations apply to those words of this section which provide that the prisoner shall not be asked any question tending to show that he is of bad character.

We have asked ourselves again and again in this case what was likely to be conveyed to the listening jury who heard the questions referred to: "Q. Having had that disagreeable experience of bankruptcy, did it not occur to you to keep books? A. The bankruptcy had nothing to do with books or no books. Q. No use at all keeping books—it would not make the slightest difference? A. In my bankruptcy it could not. Q. Or in your prosperity? A. It would make no difference. Q. Or in your honesty? A. It is the same thing." It seems to us impossible to give a meaning in that context to the words "or in your honesty" which would escape the mischief of suggesting to the jury that, in the matters referred to, the appellant had been guilty of dishonesty. The statement of counsel with regard to the object of the questions is, of course, conclusive, but that is not the question. There is a clear protection given by the Criminal Evidence Act to a prisoner giving evidence on his own behalf. What was the effect likely to be conveyed to the minds of the jury hearing these questions, culminating in the question "or in your honesty?"

We have reluctantly come to the conclusion that there is only one course open to us in this case. One of the mischiefs of excessive zeal or lack of sufficient care on the part of counsel in cross-examining a prisoner in a criminal case consists precisely in the fact that the consequences of what is done may lead to the necessary quashing of a conviction which might be sustainable on other grounds. Too great care cannot be exercised. It is essential that the provisions of the statute as to questions which may be put to a prisoner who is giving evidence should be closely and carefully observed. In our opinion, the questions in this case offend against the clear provisions of the statute and we have no alternative, though the difficulties of the matter

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are clearly obvious, but to allow the appeal and quash the conviction.

Conviction quashed.

Solicitor—Ernest C. Randall, for appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CHARLES AND MR. JUSTICE DU PARCQ.

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Preliminary Investigation before Justices—Committal for Trial—One Prisoner Arrested—Number of Witnesses Examined—Second Prisoner Arrested—No Fresh Examination of Witnesses—Depositions Read Over and Re-signed—Opportunity of Cross-examination—Irregularity in Procedure—Indictable Offences Act, 1848 (11 & 12 *Vict. c.* 42), *ss.* 17, 25—*Administration of Justice (Miscellaneous Provisions) Act*, 1933 (23 & 24 *Geo.* 5, *c.* 36), *s.* 2 (2) *and* (3).

In December, 1937, Q. was arrested and appeared before the examining justices on a number of charges of obtaining goods by false pretences and obtaining credit by fraud. After a number of hearings, in the course of which the depositions of thirty-five witnesses for the prosecution were taken in a regular manner, P. was arrested on the same charges in March, 1938. When P. appeared as a co-defendant before the justices, the above witnesses were not examined afresh, but the deposition of each was read over to him, and at the end of each deposition there appeared a signed statement: "My deposition has been read over to me and it is correct." P. was given an opportunity of cross-examining each witness. P. and Q. were subsequently tried jointly on an indictment containing seventeen counts, the charges represented by the evidence of the above thirty-five witnesses being embodied in counts one to seven inclusive. P. was convicted on these counts, and also on the

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remaining counts in which he was charged. Q. was acquitted on these counts, but convicted on eight of the remaining counts.

Held, the procedure adopted in reading over the depositions of the above witnesses was irregular and contrary to the imperative terms of section 17 of the Indictable Offences Act, 1848, with regard to the mode of taking depositions in the presence of the accused person, and the following consequences arose: (i) with regard to the charges represented by counts one to seven (inclusive), the committal of P. for trial was a nullity, and his conviction on those counts must be quashed; (ii) as the committal for trial was not to be regarded as one indivisible whole, but the committals on each charge as several and distinct, and as the evidence of the above witnesses was relevant to the other counts also, and P. had due notice that such evidence would be given, the conviction of P. on the other counts was not invalidated and must be affirmed, with proportionate reduction of sentence; (iii) as Q. had in no way suffered through the irregularity in the procedure before the examining justices, his conviction must be affirmed.

GEE (25 Cr. App. R. 198; [1936] 2 K. B. 442) applied.

Appeals against conviction and sentence.

The appellants were charged at the Central Criminal Court on an indictment containing seventeen counts. Counts one and nine charged both appellants with conspiracy to defraud. Count eight charged Quayle alone with obtaining credit by fraud in incurring a certain debt. The remaining counts charged both appellants with obtaining credit by fraud in incurring other debts and with obtaining goods by false pretences. Quayle was acquitted on counts one to eight inclusive, and convicted on the remaining counts, and on May 30, 1938, was sentenced by the Commissioner to ten months' imprisonment. Phillips was convicted on all counts in which he was charged and sentenced to three years' penal servitude and concurrent terms of imprisonment.

Quayle was arrested and appeared first before the examining justices in December, 1937. A number of hearings followed, in the course of which the depositions of thirty-five witnesses for the prosecution were taken in a

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regular manner. In March, 1938, Phillips was arrested and appeared before the justices as a co-defendant. The above witnesses were not examined afresh, but the deposition of each was read over to him, and in every case the witness acknowledged its correctness and re-signed it. At the end of each deposition there appeared the statement: "My deposition has been read over to me and it is correct." Phillips was given the opportunity of cross-examining each witness. Other witnesses were then called, and Phillips and Quayle were both committed for trial.

Both appellants were tried on a joint indictment containing seventeen counts. The evidence of the above thirty-five witnesses was represented by counts one to seven inclusive. At the trial counsel for Phillips moved to quash the indictment on the ground that the proceedings before the examining justices were so defective by reason of non-compliance with section 17 of the Indictable Offences Act, 1848, that there had been no lawful committal for trial sufficient to satisfy section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933 (*a*). The Commissioner ruled against the motion, and the trial proceeded.

(*a*) By section 17 of the Indictable Offences Act, 1848: "In all cases where any person shall appear or be brought before any justice or justices of the peace charged with any indictable offence . . . such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same . . ."

By the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2 (2): "Subject as hereinafter provided no bill of indictment charging any person with an indictable offence shall be preferred unless either (a) the person charged has been committed for trial for the offence; or (b) the bill is preferred by

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Garth Moore (*J. A. Boyd-Carpenter* with him), for both appellants:

The committal of Phillips on counts one to seven was improper, since section 17 of the Indictable Offences Act, 1848, which requires the evidence to be taken in the presence of the accused person, was not complied with, and the whole indictment ought to have been quashed. In GEE (25 Cr. App. R. 198; [1936] 2 K. B. 442), where the witnesses were examined from typewritten statements which were afterwards signed by each witness, the Court held that there was no lawful committal for trial and quashed the convictions. Accordingly, the convictions in this case ought to be quashed.

[The Court intimated that they desired to hear counsel for the Crown on this point before counsel for the appellants submitted his other points.]

R. E. Seaton, for the Crown:

The practice where one of a number of accused persons is arrested and brought before the justices after the case against the others has begun has always been for the depositions already taken to be read over to the witnesses and re-signed by them. A similar practice was approved in BOTTOMLEY, *Ex parte* ([1909] 2 K. B. 14), where the magistrate fell ill and the depostions taken before him were read over and re-signed before another magistrate: see also HAKE ((1845), 1 Cox C. C. 226). Whatever was the position with regard to counts one to seven, the remainder of the

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the direction or with the consent of a judge of the High Court . . ."

By sub-section 3: "If a bill of indictment preferred otherwise than in accordance with the provisions of the last foregoing subsection has been signed by the proper officer of the court, the indictment shall be liable to be quashed: Provided that (a) if the bill contains several counts, and the said provisions have been complied with as respects one or more of them, those counts only that were wrongly included shall be quashed under this subsection."

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indictment was good. As to Quayle, all the evidence was properly taken and the indictment was good as against him.

Garth Moore, continuing for both appellants:

BOTTOMLEY, *Ex parte* (*supra*) is distinguishable from the present case, as the defendant in that case was present throughout the examination of the witnesses. It is submitted that in the present case the committal on all charges was invalidated. In any event, counts one to seven (inclusive) were vitiated, with the result that none of that evidence should have been admitted. The conviction on the remaining counts cannot, therefore, be sustained. This is not a case for a new trial. An award of *venire de novo* is not applicable where the result would be to send the matter back to justices and not to a jury. The full title of the writ is *venire facias de novo juratores*, and the writ commences with the words: "Let a new jury come," etc. Although in GEE (*supra*), where there was no lawful committal for trial, the Court apparently held that it had jurisdiction to order a proper trial, the point now taken was not submitted, and moreover the Court in fact quashed the convictions in that case. In CRANE *v.* DIRECTOR OF PUBLIC PROSECUTIONS (15 Cr. App. R. 183; [1921] 2 A. C. 299) and in other cases the matter was sent back to the Assize Court or Court of Quarter Sessions for a jury to hear afresh. There is no reported case where a case has been sent back to justices.

R. E. Seaton, continuing for the Crown:

The committal of the appellants was a separate committal for each offence, so that there were seventeen committals. There was no evidence which was not admissible against Quayle, and it is submitted that the whole of the evidence was admissible against Phillips also: see MAKIN *v.* ATT.-GEN. FOR NEW SOUTH WALES ([1894] A. C. 57).

Garth Moore, in reply:

If the Court holds that the conviction of Phillips was vitiated, then Quayle will have been jointly indicted wrongly: see CRANE *v.* DIRECTOR OF PUBLIC PROSECUTIONS

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(*supra*). He would have been entitled to stand his trial alone, and for that reason his conviction should be quashed.

Cur. adv. vult.

July 27.—The considered judgment of the Court was read by

THE LORD CHIEF JUSTICE: The appellants were tried before the Commissioner at the Central Criminal Court on an indictment which contained seventeen counts. The first and ninth counts charged both appellants with conspiracy to defraud, the eighth count charged Quayle alone with obtaining credit by fraud in incurring a certain debt, and the remaining counts charged both appellants jointly with obtaining credit by fraud in incurring certain other debts, and with obtaining goods by false pretences.

At the trial counsel for the appellant Phillips moved on behalf of his client to quash the indictment on the ground that the proceedings before the committing justices were so defective by reason of non-compliance with section 17 of the Indictable Offences Act, 1848, that there was no lawful committal for trial within the meaning of section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933. The Commissioner ruled against that submission on the part of the defence and the trial proceeded, with the result that Quayle was acquitted on counts one to eight and convicted on counts nine to seventeen, and Phillips was convicted on each of the counts against him. Thereupon Quayle was sentenced to ten months' imprisonment and Phillips to three years' penal servitude.

Both appellants appealed to this Court against their convictions. The sole ground of the appeal was the alleged irregularity of the proceedings before the justices, which, it was argued, made the proceedings at the Central Criminal Court a nullity so far as Phillips was concerned and had consequences so prejudicial to Quayle that the conviction recorded against him ought not to stand.

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The facts as to the procedure adopted by the committing justices were not in dispute. Quayle was brought before the justices in December, 1937, and proceedings were continued against him alone until March 28, 1938, when Phillips was brought before the justices as a co-defendant with Quayle. Meanwhile thirty-five witnesses had been called and examined. Their evidence had been taken in a regular manner, in the presence of Quayle. When Phillips was brought before the Court, it became necessary to recall those thirty-five witnesses in order that they might repeat their evidence, which incriminated Phillips as well as Quayle. The evidence of those thirty-five witnesses related to the charges which were subsequently embodied in counts one to seven (inclusive).

Instead of examining each witness anew in the presence of Phillips, the justices took a course which it was thought would result in a saving of time. Each witness's deposition was read over to him and he was then asked whether it was correct. The answer was always in the affirmative, so that there appeared at the end of each witness's deposition the signed statement: "My deposition has been read over to me and it is correct." The appellant Phillips was then given the opportunity, such as it was, of cross-examining the witness whose evidence he had heard given in that summary and compendious form.

We have no doubt that this procedure, however convenient it may have seemed to be, was irregular and contrary to law. Mr. Garth Moore, in his able argument on behalf of the appellants, relied on the decision of this Court in GEE (25 Cr. App. R. 198; [1936] 2 K. B. 442). We are of opinion that in the present case the irregularity was at least as serious as that which the Court then regarded as sufficiently grave to invalidate the committal. The terms of section 17 of the Indictable Offences Act, 1848, are imperative, and if they are complied with, the accused person hears the witness give his evidence so that he is

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able to object to any question which may be put improperly and to see that the oral evidence is recorded in writing with accuracy and fairness. This opportunity was denied to Phillips, who was indeed placed in an even less favourable position than was the appellant in the case of GEE (*supra*). Counsel for the Crown referred us to the decision in BOTTOMLEY, *Ex parte* ([1909] 2 K. B. 14). It is to be observed, however, first, that the question there before the Court was whether a magistrate ought to be compelled by mandamus to hear a case in a particular manner, a question giving rise to considerations very different from any with which we are now concerned; and, secondly, that the course which the magistrate was proposing to take in BOTTOMLEY'S CASE (*supra*) did not involve the examination of witnesses in the absence of the person accused. No case was cited to us which, in our view, would justify us in holding that the terms of the section were complied with, or that the irregularity can be overlooked, and we are bound to hold, following the decision in GEE (*supra*) that, so far as concerns the charges set out in counts one to seven inclusive, the committal of Phillips was a nullity.

It was said at the Bar that the practice which was adopted by the magistrates in the present case is common, if not general. We cannot, however, regard this fact, if fact it be, as a reason for approving or condoning an irregularity which well may be prejudicial to an accused person. In the circumstances we think it right that the conviction of Phillips on counts one to seven should be quashed.

We see no reason, however, why his conviction on counts nine to seventeen should not stand. It was argued that a great deal of evidence had been called to support the first seven counts, and that Phillips had thus been prejudiced. It was, however, frankly conceded by Mr. Garth Moore that all that evidence was relevant to the charges contained in counts nine to seventeen on the issue of intent to defraud, and inasmuch as Phillips had, in the circumstances, ample

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notice that that evidence would be called, his only grievance is that he has been convicted on counts one to seven and nine to seventeen when he should have been convicted only on those counts which were properly triable—namely, counts nine to seventeen.

It was further argued that the committal must be regarded as one and indivisible, but, in our view, when magistrates commit, as they did here, on several charges, the committals are several and distinct, and if one is bad, the others are not necessarily invalidated. That this is so is plain from the language of section 25 of the Indictable Offences Act, 1848, when it is remembered that each charge relates to a separate indictable offence. The conviction of Phillips on counts nine to seventeen must stand, but, as it is reasonable to suppose that a lighter sentence would have been imposed on him if he had been convicted on nine counts instead of sixteen, we think it fair that a sentence of twenty months' imprisonment with hard labour should be substituted for the sentence which was passed.

We can find no ground for saying that Quayle has suffered in any way through the irregularity of the procedure before the justices. So far as he was concerned, that procedure was quite regular. All the evidence called at the trial, in so far as it affected him at all, was undoubtedly admissible against him, and would have been equally admissible against him if he had been tried alone. It may be added that on the only counts as to which difficulty has arisen the verdict in his case was *Not Guilty*. His appeal must, therefore, be dismissed.

One conviction quashed in part and sentence reduced.
One appeal dismissed.

Solicitor for the Crown : Solicitor for Metropolitan Police.

HENRY WILLIAM BODENHAM.

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HENRY WILLIAM BODENHAM.

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Sentence — Maximum — Living on Earnings of Prostitution — Vagrancy Act, 1898 (61 & 62 *Vict. c.* 39), *s.* 1—*Criminal Law Amendment Act*, 1912 (2 & 3 *Geo.* 5, *c.* 20), *s.* 7 (2), (5).

Observations on the sentence which may be imposed for the offence of living on the earnings of prostitution.

Application for leave to appeal against conviction and sentence.

The applicant was convicted at London Sessions on June 30, 1938, of living on the earnings of prostitution, and was sentenced by the Chairman to six months' imprisonment with hard labour. In passing sentence the Chairman observed: "I wish I was able to impose upon you a more severe sentence, but unfortunately the maximum penalty for this charge is six months' hard labour."

No counsel appeared on either side.

DU PARCQ, J.: The Chairman appears to have been under a misapprehension. The powers of the Court were not as limited as he supposed. It is quite true that by the combined effect of section 1 of the Vagrancy Act, 1898, and section 7 (2) of the Criminal Law Amendment Act, 1912, the maximum sentence which may be imposed upon a person deemed to be a rogue and vagabond under the Vagrancy Act, 1898, and dealt with summarily, is one of six months' imprisonment with hard labour, but by section 7 (5) of the Act of 1912 a person charged with an offence under the Vagrancy Act, 1898, instead of being proceeded against as a rogue and vagabond, may, as this applicant was, "be proceeded against on indictment, and on conviction on indictment shall be liable to imprisonment, with or without hard labour, for a term not exceeding two years, and, in the case of a second or subsequent conviction, such second

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or subsequent conviction being a conviction on indictment, the Court may, in addition to any term of imprisonment awarded, sentence [him] to be once privately whipped." We do not propose to give leave to appeal against sentence, and the applicant has some cause to be grateful to the Court for not giving leave to appeal. If the applicant is not sufficiently deterred by the sentence passed upon him, it is to be hoped that his attention will be directed to the last words of sub-section 5 of section 7 of the Act of 1912 so that he may know what possible sentence may await him if he is again convicted of this offence. The application is refused.

Application refused.

JACK FIELDING.

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JACK FIELDING.

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Grounds of Appeal — Particulars of Alleged Misdirection or Non-Direction Essential.

Observations on the necessity for particulars of alleged misdirection or non-direction appearing in grounds of appeal.

Appeal against conviction.

The appellant was convicted at Liverpool Assizes on June 24, 1938, of conspiracy to defraud and fraudulent conversion and was sentenced by Greaves-Lord, J., to six months' imprisonment in the second division.

E. Wooll, for the appellant.

Basil E. Nield, for the Crown.

It is unnecessary to set out the facts of the case, which is reported solely on account of observations with regard to particulars in grounds of appeal.

DU PARCQ, J.: It is most unsatisfactory that grounds of appeal should be drawn with such vagueness as we find in the present case. Ground 4 is in the following terms: "That the Judge failed adequately to direct the jury as to the law and evidence to be considered by them."

It has been said many times in this Court that particulars must be given in the grounds of appeal. If misdirection is complained of, it must be stated whether the alleged misdirection is one of law or fact, and its nature must also be stated. If omission is complained of, it must be stated what is alleged to have been omitted. It is not only placing an unnecessary burden on the Court to ask it to search through the summing-up and the transcript of the evidence to find out what there may be to be complained of, but it is also unfair to the prosecution, who are entitled to know what

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case they have to meet. We hope that it will not again be necessary to point out a similar inadequacy in grounds of appeal. [His Lordship went on to say that, in the opinion of the Court, there were no grounds for interfering with the conviction.]

Appeal dismissed.

Solicitors for appellant: Bieber & Bieber, Liverpool.

BEFORE

MR. JUSTICE BRANSON, MR. JUSTICE DU PARCQ AND MR. JUSTICE WROTTESLEY.

COLIN CHARLES ORAM.

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Joint Trial — One Prisoner Convicted, the other Acquitted — Statement of one Prisoner — Jury Directed to Disregard Statement as regards other Prisoner "so far as Humanly Possible" — Failure to Disregard Statement — Conviction Quashed.

On the trial of O. and S., who were charged with an attempt to procure the commission of an act of gross indecency with each other, the police evidence was the same against both prisoners, but a statement made by S. to the police implicating O. was given in evidence. In summing up the Judge directed the jury that, in dealing with the case against O., they should disregard, so far as humanly possible, the statement made by S. The jury found O. guilty and S. not guilty.

Held, since the police evidence against both prisoners was the same, the jury in convicting O. must have acted upon the statement of S., which was not evidence against O., and that O.'s conviction must be quashed.

Appeal against conviction.

The appellant was convicted at Nottinghamshire Assizes on July 1, 1938, of an attempt to procure the commission of an act of gross indecency with one Dennis Salter, who was charged and tried with him, and was sentenced by Asquith, J., to six months' imprisonment.

At the trial the appellant and Salter were indicted on an indictment containing three counts; count 1 charging the appellant and Salter with attempting to procure the commission of an act of gross indecency with each other; count 2 charging the appellant with attempting to procure

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the commission of an act of gross indecency with Salter; and count 3 charging Salter with attempting to procure the commission of an act of gross indecency with the appellant. An application was made on behalf of the appellant for a separate trial, but this was refused. Evidence was given by police officers that they went to a public lavatory where they heard a tapping noise proceeding from one of the cubicles and that, the door being locked, they broke it open and found the two prisoners inside with their trousers unfastened. The prisoners were taken to the police station, where they made statements. The statement made by Salter charged the appellant with an attempt to commit buggery with him. These statements were put in evidence at the trial, but, in the course of the trial, Salter repudiated his statement and told a story confirming the evidence of the appellant.

The Judge, in summing up, directed the jury to disregard the first count of the indictment and also, in dealing with the case against the appellant, to disregard, so far as humanly possible, the statement of Salter. The jury returned a verdict of guilty in the case of the appellant and a verdict of not guilty in the case of Salter.

S. H. Granville-Smith, for the appellant:

Apart from the statement made by Salter at the police station, the evidence against the two prisoners was identical. The Judge failed to warn the jury properly against accepting that statement: see PEARSON ((1908), 1 Cr. App. R. 77). The Judge ought also to have granted the appellant's application for a separate trial. The statement of Salter was clearly not admissible as against the appellant: see CHRISTIE (10 Cr. App. R. 141; [1914] A. C. 559). The Judge in his summing up did not explain clearly which evidence affected each prisoner severally.

G. G. Raphael, for the Crown:

The prisoners in this case were properly tried together,

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and it is submitted that the Judge properly reminded the jury that Salter's statement was not evidence against the appellant. There was a substantial case against the appellant apart from Salter's statement. The jury may have thought that that statement was true and that Salter's subsequent denial in the witness-box was untrue. In any event the jury were the best judges of the evidence.

S. H. Granville-Smith, in reply:

Leaving out Salter's statement, the jury came to two contrary conclusions, since there was exactly the same evidence against both men.

BRANSON, J.: This appellant, Colin Charles Oram, was indicted at the Nottinghamshire Assizes on an indictment which, in the first count, charged him together with one Dennis Salter with attempting to procure the commission of an act of gross indecency with each other. In the second count Oram was charged with attempting to procure the commission of an act of gross indecency with Salter, and in the third count Salter was charged with attempting to procure the commission of an act of gross indecency with Oram. The Judge directed the jury to disregard the first count and left only the second and third counts to them.

When the case was called on, an application was made on behalf of Oram that the two prisoners should be tried separately, on the ground that Salter had made a statement to the police charging Oram with an attempt to commit an offence of buggery with him. The Judge ruled that it was not a case in which it was necessary to have separate trials. The evidence of the police was then called. A detective sergeant and a detective constable gave evidence that they went to a public lavatory and heard a tapping noise proceeding from one of the cubicles. The door was locked, but they broke it open and inside they found Oram and Salter, both with their trousers unfastened. Oram and Salter were taken to the police station, where they both made

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statements. The statement of Salter was given in evidence at the trial, and the statement of the appellant Oram was also given in evidence. In summing up the Judge directed the jury that in dealing with Oram they should disregard, so far as humanly possible, the statement made by Salter, which was not evidence against Oram. Moreover, in the course of the trial Salter had repudiated his own statement and told a story confirming the evidence given by Oram. The jury found Oram guilty on count 2 and Salter not guilty on count 3. It appears to us that the only possible way in which the jury could have arrived at those verdicts was that they thought that the evidence given by the police officers was not sufficient. If they had not thought so, they must have found Salter guilty as well as Oram. But if they felt that the evidence of the police officers was insufficient, they should have found Oram also not guilty. It is necessary, therefore, to see how the jury came to find Oram guilty, and the only explanation is that, notwithstanding the warning given to them, they found it not humanly possible to disregard the statement of Salter. They evidently disregarded his evidence in the witness-box and accepted his statement to the police. They had no business, of course, to act on that statement as against Oram, and the result is that this conviction cannot stand and must be quashed.

Conviction quashed.

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